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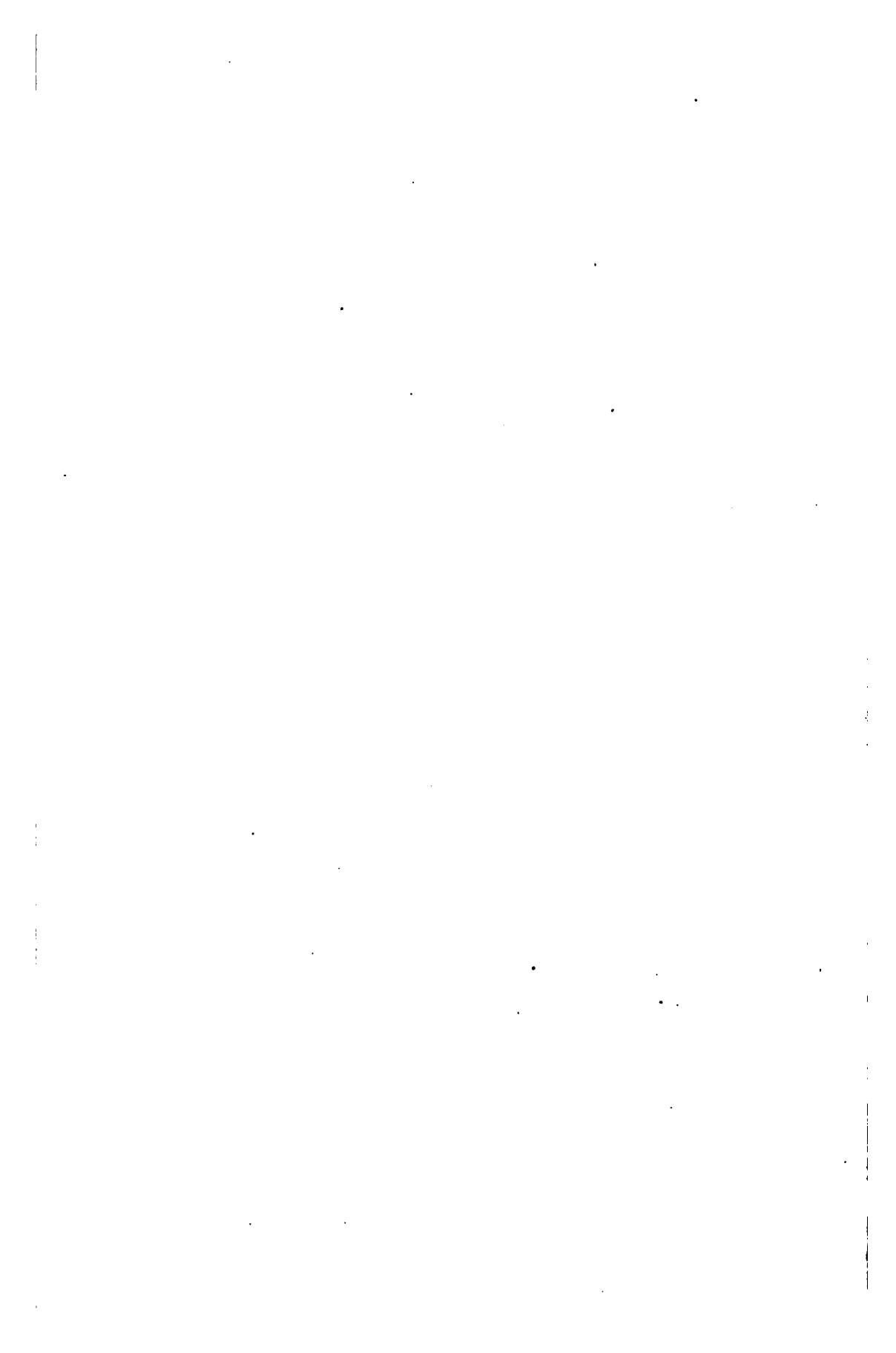
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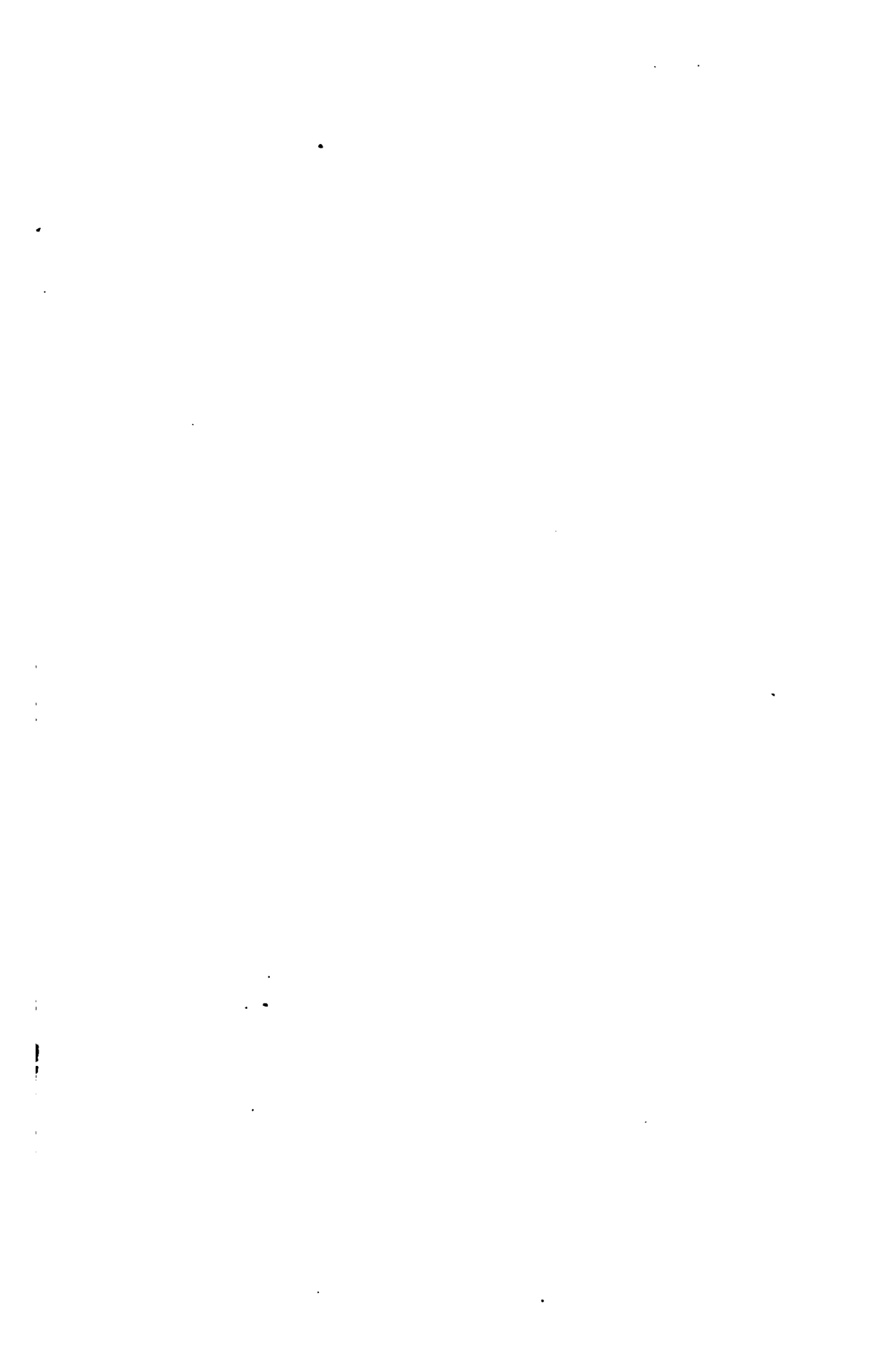
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A TREATISE
ON THE LAW OF
MECHANICS' LIENS

INCLUDING THE PROCEDURE
FOR PERFECTING AND ENFORCING SUCH
LIENS, TOGETHER WITH

COMPLETE FORMS

BY

WILLIAM M. ROCKEL

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PREFACE

Mechanics' liens are of modern origin and the law upon the subject is the only great branch of our law that is entirely of American origin and has had its development wholly among the English-speaking people of this continent.

Great Britain, the mother country, to whose jurisprudence we are indebted for the fundamental principles of much the greater part of our law, has not even to this day laws affording relief and protection to that very deserving class of citizens that come within the design of our statutes relating to mechanics' liens. While the civil law in a measure gave protection to this class of persons, yet it has not been generally followed in the Latin republics.

All liens, whether of common law, civil law or statutory origin, are founded upon the same equitable principles, and, therefore, we find that while there is much difference in the details of the various statutes of the several states, and much that cannot be used as precedent in all jurisdictions, yet there is much in common in these statutes and decisions, and the judges of one jurisdiction look with favor on the decisions of those in another.

In the following pages the law of mechanics' liens is set out in a systematic way. The author has avoided unqualified statements of the law where the decisions are in conflict, and having in mind the fact that the conflicts in most cases are due to a difference in the statutes, has adopted the method of setting out the opposite holdings in such cases. The decisions have all been personally examined.

There is a growth toward uniformity in the statutes of the different commonwealths and a consequent tendency toward uniformity in the decisions, and it will not be long until the

law relating to mechanics' liens will be as stable and uniform and as well settled as any other distinct branch of English law.

The subject is not given an abstract treatment, but in order to make the book most useful to the profession the entire procedure necessary to the establishment and the enforcement or defeat of the lien is presented. The same consideration of usefulness has induced the insertion of working forms at appropriate places throughout the book.

The table of cases will show what a fruitful source of litigation the subject of mechanics' liens has been; and as practically all the reported decisions have been examined, it is confidently believed that a more extensive and more thorough discussion of this important subject will be found in the following pages than in any book issued.

In order to make the book useful in connection with the lawyers' library parallel references have been given to the Reporter System, the L. R. A., the American Decisions, the American Reports and the American State Reports. References are likewise made to the sections (key numbers) of the Decennial and American Digests, so that later cases on similar matters may be readily found.

The author first became interested in the subject of mechanics' liens more than twenty years ago, and that interest, in various ways—as judge, attorney and author—has since been maintained. He submits this work with the belief that the manner in which the law has been gleaned from the multitude of reports and its classification and grouping herein will be a useful aid toward reaching the desired uniformity in the law and will give to the active practitioner a speedy way to “find the law” and assist him in its proper administration and thereby accomplish the beneficent purposes intended by mechanics' lien laws.

WILLIAM M. ROCKEL.

Springfield, Ohio, May 25th, 1909.

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A TREATISE ON THE LAW OF MECHANICS' LIENS

CHAPTER 1.

ORIGIN AND GENERAL PRINCIPLES.

Sec.

1. Origin.
2. Nature and definition.
3. Law of place where building located, controls.
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Sec.

7. Retroactive effect.
8. Construction of law.
9. To whom right granted to secure lien.
10. Property that may be subject to lien.
11. Quantity of interest or estate subject to lien.

§ 1. **Origin.**—In 1791 Thomas Jefferson, James Madison and others addressed the legislature of Maryland as follows, "Your memorialists conceive it would encourage master builders to contract for erection and furnishing of houses for certain prices agreed upon, if a lien was created by law for their just claim on the house erected and the lot of land on which it stood."¹ In response to this petition the General Assembly of Maryland on December 19, 1791, passed an act creating such liens.² This was the beginning of this branch of law in nations where the common law prevails. While the idea of the lien is somewhat similar to the lien given by the common law on personal property, a lien on real estate was entirely unknown to the common law.³ The civil law recognized the justice of

¹ Proceedings of Commissioners from 1791 to 1795, p. 28.

² Act General Assembly Maryland, ch. 45, Dec. 18, 1791.

³ Ex Parte Schmidt v. Smith, 62 Ala. 252; Anderson v. Seamans, 49 Ark. 475, 5 S. W. 799; Gove v. Cather, 23 Ill. 585;

such a lien and made some provisions for it.⁴ Pennsylvania was the second state to adopt a law recognizing the lien.⁵ Other states followed, until at this time every state of the union, as well as the Canadian provinces has a statute creating and enforcing liens of this character.⁶ Neither Mex-

Sweet & Carpenter v. James, 2 R. I. 270; Cole v. Hall, 12 Ont. Pr. Rep. 584.

⁴ Domat's Civil Law Sec. 1741; Code Napoleon, p. 571. The state of Louisiana has substantially followed this code. C. C. 3217, 3272.

⁵ Laws Penn., Act April 1, 1803.

⁶ Alabama.—Code sec. 2723 et seq.

Alaska.—Civil Code, secs. 262 to 275.

Arizona.—Rev. St., ch. 2, tit. 40, 1901 par 1888 to 2914.

Arkansas.—Kirby's Dig. 1904, p. 1068.

California.—Code Civil Proc. sec. 1183-1203, Deering's Ed. 1903.

Colorado.—Mills Ann. St. sec. 2867, 3 Sup. Vol.

Connecticut.—Gen. St. sec. 4135-4148.

Delaware.—Rev. Code, p. 818, 1893.

District of Columbia.—Code Dist. Col. sec. 1237 to 1264.

Illinois.—Hurd's Rev. St. 1908, ch. 82, § 15 et seq.

Indiana.—Burns' Rev. St. 1908, §§ 8295 et seq.

Louisiana.—Act 180, 1894, Act. 123, 1896.

Maine.—Rev. St., Ch. 93, 1903.

Maryland.—Act 63 sec. 1, Code 1888. Act. 1898, ch. 502, Act. 1902, ch. 432-502.

Massachusetts.—Rev. St. p. 1700-1706, Laws 1902.

Michigan.—Comp. Laws 1897, Vol. 3, sec. 10710-10742.

Minnesota.—Gen. St. ch. 90, sec. 6229, et seq. 1894.

Mississippi.—Ann. Code, sec. 2698-2715, 1892.

Missouri.—Rev. St., sec. 4203-4227, 1899.

Montana.—Code Civ. Proc. sec. 2130-2141, 1895.

Nebraska.—Cobbey's Ann. St. col. 2 p. 2178. Com. St. Chap. 54.

Nevada.—Comp. Laws—Cuttings Ed. Sec. 3881. Amended Sess. Laws, p. 51, 1903.

New Hampshire.—Pub. St., p. 388, 389, 1891. Chase's Edition 1900, p. 452.

New Jersey.—Act of 1898, p. 457.

New Mexico.—Comp. Laws, sec. 2217-2233, 1897.

New York.—Laws 1897, ch. 418; Cummings & Gilbert Gen. Laws, p. 2142.

North Carolina.—Code Vol. 1, ch. 41, Act 1901, ch. 617. Rev. Code, sec. 2016-2057, 1905.

North Dakota.—Rev. Code, sec. 4788-4801, 1899.

Ohio.—97 Ohio Laws, p. 499, 1904.

Oklahoma Territory.—Civ. Code, sec. 4527-4542; Wilson's Stat. 1883, St. p. 870.

Oregon.—Ballinger & Cotton's Ann. Code, sec. 5640-5667.

ico⁷ nor Great Britain⁸ have such laws. Some states recognize the right to the lien by constitutional provision.⁹

§ 2. **Nature and definition.**—While the lien is created by statute it has become so fixed in our jurisprudence as to have a nomenclature of its own and the term "Mechanics' Liens" may be said to be a generic name for all liens on real estate in favor of persons furnishing labor or materials in or for the erection of buildings or making improvements on real estate. It rests entirely upon the statute of the state in which the real estate is located and such statute will govern and control what may be included in its terms.¹ The lien itself may be defined to be a right granted by statutory enactment to persons fur-

Pennsylvania.—Laws 1891, p. 431; Laws 1905, p. 173.

Rhode Island.—Gen. Laws, ch. 206, p. 673, 1896.

South Carolina.—Code Laws sec. 3008-3047.

South Dakota.—Rev. Code, sec. 695-712, 1893.

Tennessee.—State Code, Shannon's Ed. sec. 3531-3546.

Texas.—Rev. St. art. 3294-3297, 1895.

Utah.—Rev. St. sec. 1372-1400, 1898, ch. 58; Laws 1899.

Vermont.—Vermont St. 1894, sec. 2273-2281.

Virginia.—Code (Pollard Ed.) sec. 2475 et seq.

Washington.—Ballinger's Code sec. 5900-5918; Pierce's Code, sec. 6102-6120.

West Virginia.—Code, Warth, 4 Ed. p. 699.

Wisconsin.—Rev. St., ch. 143, sec. 3314 et. seq.

Wyoming.—Rev. St., sec. 2889-2910, 1899.

British Columbia.—Mechanic's Lien act, 1891.

Manitoba.—Rev. St., ch. 110, 1902.

New Brunswick.—Consol. St., Vol. 2, p. 1745.

Newfoundland.—Consol. St. (Second Series) 1900, ch. 188.

Nova Scotia.—Rev. St., Vol. 1, p. 171, ch. 27; Acts, 1902, ch. 25; Acts 1903-4, ch. 31, Acts, 1905.

Ontario.—Rev. St., Vol. 1, cap. 153, pp. 1516-1538; Ont. St., 62, Vic. cap. 2, schedule 3; Ont. Stat. 2, Ed. VII. cap. 21, sec. 1.

Quebec.—Civ. Code Prov. Quebec, art. 2013-2013-1; 4 Edw. VII ch. 43, sec. 1.

⁷ Macondray v. Simmons, 1. Cal. 393.

⁸ Shaw v. Young, 87 Me. 274, 32 Atl. 897.

⁹ Powers Lumber Co. v. Wade, (Tex. Civ. App.). 39 S. W. 158. Blakeney v. Nally (Tex. Civ. App.), 101 S. W. 875.

¹ Florman v. School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469; United States Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769; Bonner v. Minnier, 13 Mont.

nishing labor or materials for the erection of buildings or making improvements on real estate to have such real estate and the buildings thereon sold and the proceeds applied in payment for such labor or materials.² It is not a general lien. It has a nature peculiar to itself of an equitable character,³ and is said to rest upon the broad ground of natural equity and commercial necessity.⁴ While it may rest largely upon an equitable basis,⁵ yet without a statute the broad principles of equity would not reach it.⁶ However, some few courts have held that a lien of this character might be reserved as between the parties.⁷ Originally the statutes were limited to particular kinds of labor but imperceptibly the extent of the lien has been enlarged until at present it has been brought to include labor and services of various kinds and secures the pay of the mechanic, material man or contractor for any and all labor or services rendered in the betterment of the property;⁸ and the construction placed upon these statutes has been broadened so as to carry into force their intended purpose.⁹

§ 3. Law of place where building located controls.—The object of the lien being to subject real estate to its satisfaction,

269, 34 Pac. 30, 40 Am. St. 441; Volker-Scowcroft Lumber Co. v. Vance, 32 Utah 74, 88 Pac. 896. See Dec. Dig tit Mechanics' Liens, § 1.

² Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. 181; Thompson v. Baxter, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. 85; Frost v. Ilsley, 54 Me. 345.

³ Mochon v. Sullivan, 1 Mont. 470.

⁴ Mochon v. Sullivan, 1 Mont. 470.

⁵ Goodman v. Baerlocher, 88 Wis. 287, 80 N. W. 415, 43 Am. St. 893.

⁶ Ellison v. Jackson Water Co., 12 Cal. 542; Emerson v. Gainey, 26 Fla. 133, 7 So. 526; Slack v. Collins, 145 Ind. 569, 42 N. E. 910; Miller v. Hollingsworth, 33 Iowa, 224; Withrow Lumber Co. v. Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61. 1 Pom. Eq. sec. 167.

⁷ Smith v. Kennedy, 89 Ill. 485; Taylor v. Huck, 65 Tex. 238; Martin v. Roberts, 57 Tex. 564; Gaylard v. Loughridge, 50 Tex. 573.

⁸ Church v. Smithea, 4 Colo. App. 175, 35 Pac. 268; Collins v. Mott, 45 Mo. 100.

⁹ Durling v. Gould, 83 Me. 134, 21 Atl. 833.

the law of the territory or state where such real estate is located necessarily controls in determining the question as to the existence of the lien.¹ In other words such laws have no extraterritorial effect and if the material for a building were delivered to the owner of the land in a state other than that in which the building is located, there would be no lien.² If land has been ceded to the United States merely for governmental uses the laws of the state, however, would control.³ But if a territory is carved out of a state and no provision is made stipulating that the laws of the state in relation to mechanics' liens shall remain in force, no lien can be acquired upon property in the territory.⁴ Formerly the laws applied to particular portions of the state and in that case it could not be applied to another portion,⁵ and upon this question the statute was strictly construed.⁶

§ 4. **Constitutionality.**—At first various objections were made to these statutes upon the claim that they infringed some constitutional provision but it is now generally conceded that no such valid objection can be made to these laws.¹ They are not class legislation.² And even where the law made the lien prior to existing mortgages, it was upheld as not being unconstitutional because of taking property without due pro-

¹ See Dec. Dig. tit. Mechanics' Liens, sec. 2. *Birmingham v. Glen Cove*, 78 N. Y. 30.

² *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1581, 28 So. 182.

³ *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604.

⁴ *Townsend v. Wild*, 1 Colo. 10.

⁵ *Missouri*.—*Spellman v. Shook*, 11 Mo. 340; *Heamann v. Porter*, 35 Mo. 137.

New York.—*Hickey v. Schwab*, 64 How. Pr. (N. Y.) 8; *Cock-*

erill v. Loonam, 36 Hun (N. Y.) 353.

Pennsylvania.—*Parsons v. Winslow*, 1 Grant's Cas. (Pa.) 160; *James v. Keller* (Com. Pl.) 2 Pa. Dist. R. 165.

⁶ *Nunes v. Wellisch*, 75 Ky. (12 Bush.) 363.

¹ See Dec. Dig. tit. Mechanics' Liens, sec. 3. *Palmer v. Tingle*, 55 Ohio St. 432, 45 N. E. 313.

² *Summerlin v. Thompson*, 31 Fla. 369, 12 So. 667; *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114.

cess of law.³ However, in the latter instance the law only made the lien prior so far as the materials increased the value of the property. A requirement in the law that it should be valid and binding, even if no notice were given for sixty days, was held not to be unconstitutional.⁴ And the mere fact that the statute permits the owner to require an indemnity bond from the contractor will not affect its constitutionality.⁵ Neither will a law declaring a lessor's interest subject to a lien be unconstitutional.⁶ In some states statutes have been upheld which allowed an attorney's fee.^{6a} However, upon this latter proposition in other states there would be a different conclusion. There is a difference of opinion in regard to the constitutionality of statutes which give a lien without regard to the indebtedness existing between the contractor and the owner. A majority of the courts, however, hold that such statutes are valid.⁷ A very respectable

³ *Hisks v. Murray*, 43 Cal. 515; *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863; *Alvord v. Hendrie*, 2 Mont. 115.

⁴ *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40.

⁵ *Cole v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

⁶ *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253.

^{6a} *Helena, etc., Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78. See post, §300; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

⁷ *California*.—*Hicks v. Murray*, 43 Cal. 515.

Maine.—*Atwood v. Williams*, 40 Me. 409.

Massachusetts.—*Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283; *Donahy v. Clapp*, 12 Cush. (Mass.) 440.

Michigan.—*Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114. See post. sec. 45.

Minnesota.—*Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354.

Missouri.—*Henry v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332.

Nebraska.—*Ballou v. Black*, 21 Neb. 131, 31 N. W. 673.

Ohio.—*In re Mechanic's Lien Land*, 7 Ohio N. P. 668, 5 Ohio Dec. 564; *Pence v. Roads*, 6 Ohio Dec. 90, 4 Ohio N. P. 63; *Jenks v. Kress*, 7 Ohio Dec. 109, 4 Ohio N. P. 82.

Tennessee.—*Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

Virginia.—*Improvement Co. v. Karn*, 80 Va. 589.

Wisconsin.—*Mallory v. Abbatoir*, 80 Wis. 170, 49 N. W. 1071.

United States.—*Jones v. Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108.

minority hold that such laws are unconstitutional;⁸ and in some instances the United States Courts have declined to follow the rule adopted by a state court and have held with the prevailing opinion that such laws are constitutional.⁹ A law, however, that provided that a lien might attach where made with the reputed owner and not with its actual owner, was held void.¹⁰ So, an act that made a contractor failing to pay off a lien when he has received his money liable to a fine and imprisonment was held void.¹¹ So a statute providing that a lien might be enforced without actual or constructive notice to the owner has been held void.¹² And part of the law might be held constitutional and another part unconstitutional.¹³ A law giving a certain court jurisdiction is not for that reason unconstitutional.¹⁴ A statute allowing to a successful claimant the expense of filing his lien has been held not unconstitutional.¹⁵

§5. Enactment of laws.—Laws relating to liens are enacted under the same rules as other statutes and are not repealed by implication.¹ But they may be repealed by an inconsistent

⁸ *Henry & Coatsworth v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 33; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 113; *Van Cleve Glass Co. v. Wamelink*, 6 Ohio Dec. 521, 4 Ohio N. P. 383.

⁹ *Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165; *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108.

¹⁰ *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, 48 Pac. 1097.

¹¹ *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 12 Am. St. 663, 1 L. R. A. 777.

¹² *Selma Sash, Door & Blind Factory v. Stoddard*, 116 Ala. 251, 23 So. 555.

¹³ *New England Engineering Co. v. Oakwood St. R. Co.* (C. C.) 75 Fed. 162; *McCune v. Snyder*, 8 Ohio S. & C. P. Dec. 316.

¹⁴ *McNeill v. Vorland*, 23 Cal. 144.

¹⁵ *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982.

¹ *Alabama*.—*Birmingham Building & Loan Ass'n. v. May & Thomas Hardware Co.*, 99 Ala. 276, 13 So. 612; *Randolph v. Builders' & Painters' Supply Co.*, 106 Ala. 501, 17 So. 721.

Indiana.—*Beaver v. Wilkinson*, 9 Ind. App. 693, 37 N. E. 188; *Specter v. Kimball & Cobb Stone Co.*, 7 Ind. App. 157, 34 N. E. 452; *Taylor v. Dahn*, 6 Ind.

act.² A general law, however, will not be presumed to repeal a prior local law.³ The law in force at the time the contract is made will control the determination of the fact whether or not the lien exists, but the law in force at the time the lien is perfected will control the proceedings in perfecting and enforcing the lien.⁴

§ 6. **Operation of repeal or change of law.**—It is a general rule, that where a statute is passed changing a law, unless the language is expressly to the contrary, it is taken to mean to apply to the facts coming into existence after the passage of the statute.¹ It has even been held that if there is no saving clause in the new act the lien under the old one becomes ineffective.² If the law is repealed without a reservation it is to be treated as if it never existed; however, where the materials have been furnished then the right becomes a vested one and it can not be destroyed by repealing the law.³ If it is plain that

App. 672; 34 N. E. 121, 51 Am. St. 312.

Louisiana.—Vordenbaumen v. Bartlett, 105 La. 752, 30 So. 219.

New York.—Van Denburgh v. Village of Greenbush, 66 N. Y. 1.

Wisconsin.—Bentley v. Adams, 92 Wis. 386, 66 N. W. 505.

² Toledo Novelty Works v. Bernheimer, 8 Minn. 118.

³ McKay v. City of New York, 46 App. Div. (N. Y.) 579, 62 N. Y. Supp. 58.

⁴ Illinois.—Kendall v. Fader, 199 Ill. 294, 65 N. E. 318.

Ohio.—Treloar v. Hamilton, 225 Ill. 102, 80 N. E. 75; Kloepfinger v. Grasser, 25 Ohio C. C. R. 90. In re Mechanic's Lien Land, 7 Ohio N. P. 668, 5 Ohio Dec. 564; Gorman v. Beppler (Com. Pl.) 4 Ohio N. P. 241.

¹ Irwin v. Beynow, 4 Manitoba 10.

² Purmort v. Tucker Lumber Co., 2 Colo. 470; Christman v. Charleville, 36 Mo. 610; Dunwell v. Bidwell, 8 Minn. 34; Seattle & W. W. R. Co. v. Ah Kow, 2 Wash. Terr. 36, 3 Pac. 188.

³ Illinois.—Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031; Boynton v. Holcomb, 49 Ill. App. 503.

Kansas.—Weaver v. Sells, 10 Kan. 609.

Maine.—Frost v. Isley, 54 Me. 345.

Michigan.—Hanes v. Wadey, 73 Mich. 178, 41 N. W. 222, 2 L. R. A. 498; Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. 549.

Minnesota.—Bailey v. Mason, 4 Minn. 546.

North Dakota.—Craig v. Herzman, 9 N. Dak. 140, 81 N. W. 288.

it was not intended to destroy rights acquired under an old law, but simply to consolidate a lien under the old law, then the remedy may be had under the new one.⁴ Unless otherwise provided by law,⁵ the law governing the foreclosure of the lien is the statute in force at the time the petition is filed.⁶ The rights of the parties however are fixed by the law in force at the time the contract was made, even though a later law is followed in the procedure of foreclosure.⁷ Where a lien is to be perfected at certain time, the law in force at that time controls.⁸ And sometimes it is held where some of the material is furnished, while one law is in force, and other material when another law is in force, a lien for each should be perfected under the law in force at the time that the material was furnished.⁹ These questions arising on the effect of the change

⁴ *Sabin v. Connor*, 21 Fed. Cas. 12, 197; *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688; *Rhine v. Mauk*, 14 Mont. Co. Law Rep. (Pa.) 197, 21 Pa. Co. Ct. 345; *Ainslie v. Kohn*, 16 Ore. 363, 19 Pac. 97; *Joseph N. Elsendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22.

⁵ *Nelson v. Sykes*, 44 Minn. 68, 46 N. W. 207; *Welde v. Henderson*, 53 Hun (N. Y.) 633, 6 N. Y. Supp. 176; *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308, 39 Pac. 815.

California.—*McCrea v. Craig*, 23 Cal. 522; *Turney v. Saunders*, 5 Ill. (4 Scam.) 527; *Barton v. Steinnitz*, 37 Ill. App. 141.

Illinois.—*Berndt v. Armknecht*, 50 Ill. App. 467.

Kansas.—*Nixon v. Cydon Lodge No. 5, Knights of Pythias, of Salina*, 56 Kan. 298, 43 Pac. 236; *Main Street Hotel Co. v. Horton Hardware Co.*, 56 Kan. 448, 43 Pac. 769.

Minnesota.—*Pond Machine Tool Co. v. Robinson*, 38 Minn. 272, 37 N. W. 99.

Missouri.—*Hausere v. Hoffman*, 32 Mo. 334.

North Carolina.—*Heckmann v. Pinkney*, 6 Abb. N. Cas. (N. Y.) 371.

⁶ **Tennessee.**—*Phillips v. Mason*, 54 Tenn. (7 Heisk.) 61.

⁷ **Willamette Falls Transp. & Mill Co. v. Riley, 1 Ore. 183; *Mahon v. Surerus*, 9 N. Dak. 57, 81 N. W. 64; *Griffin v. Seymour*, 15 Col. 487, 63 Pac. 809; *Kinsy v. Ellerman*, 23 Ky. L. 913, 62 S. W. 1009; *McNicholas v. Tinsler*, 127 Ill. App. 381; *Kelley v. Springer Id.*; *Campbell v. Same, Id.***

⁸ *Willim v. Bernheimer*, 5 Minn. 288 (Gil. 229); *Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262.

⁹ *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120; *Hill v. Lovell*, 47 Minn. 293, 50 N. W. 81.

or repeal of the law, present some perplexing features which are now generally avoided by saving clauses in the various statutes. The time to prosecute a lien will not be cut down by a later act providing less time.¹⁰

§ 7. **Retroactive effect.**—As a lien of the character of the mechanic's lien has for its basis a contract between the owner and the contractor, it would impair the obligation of contracts within the constitutional prohibition to make that a lien which was not subject to a lien at the time the contract became effective. But the provision is not violated by a provision which merely relates to the procedure necessary to enforce or perfect the lien.¹ But even in such cases the act will be held to apply to future contracts and procedure unless otherwise specifically declared in the act.² And the act itself must show an unmistakable intention to have the law act retrospectively before it

¹⁰ *Nystrom v. London & N. W. American Mortg. Co.*, 47 Minn. 31, 49 N. W. 394; *Nystrom v. Hamm*, 47 Minn. 33, 49 N. W. 394; *Montgomery v. Allen*, 21 Ky. L. 1001, 53 S. W. 813; *Fox v. Somerset Odd Fellows Hall & Auditorium Co.*, 21 Ky. L. 1272, 54 S. W. 835. Where the goods were contracted for before the passage of the act but delivered after its approval—see *Horn & Brannen Mfg. Co. v. Steelman*, 215 Pa. 187, 64 Atl. 409.

¹ *Craig v. Herzman*, 9 N. Dak. 140, 81 N. W. 288. See Dec. Dig. tit. Mechanics' Liens, Sec. 6.

² *Alabama*.—*Smith v. Kolb*, 58 Ala. 645; *Florence Gas, Electric Light & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343.

Colorado.—*Chicago Lumber Co. v. Dillon*, 13 Col. App. 207, 56 Pac. 1131; *Townsend v. Wild*, 1 Col. 10.

Florida.—*McCarthy v. Havis*, 23 Fla. 508, 2 So. 819.

Georgia.—*Stonewall Jackson Loan & Building Ass'n. v. McGruder*, 43 Ga. 9.

Illinois.—*Springer v. Bowerman*, 75 Ill. App. 352.

Kentucky.—*Vass v. Otting*, 22 Ky. 551, 58 S. W. 433.

Maine.—*Kendall v. Folsom*, 34 Me. 198.

Massachusetts.—*Pierce v. Cabot*, 159 Mass. 202, 34 N. E. 362; *French v. Hussey*, 159 Mass. 206 34 N. E. 362.

Mississippi.—*Andrew v. Washburn*, 11 Miss. (3 Sm. & M.) 109.

New York.—*Donaldson v. O'Connor*, 1 E. D. Smith, (N. Y.) 695; *Fitzpatrick v. Boylan*, 57 N. Y. 433; *McDonald v. City of New York*, 62 N. Y. Supp. 72, 29 Misc. Rep. 504.

Ohio.—*Kloeppinger v. Grasser*, 25 Ohio C. C. 90.

will be so considered.³ The time of the enforcement of the lien, being a part of the procedure, may be extended.⁴ Where the contract is made before the work is performed or the materials furnished and the law is changed, the lien can be enforced under the new law. In such case the contract will be held to be dated when the work is done or the materials furnished.⁵ Possibly, if the work was begun before, and continued after, the passage of the law, and the statute did not otherwise provide,⁶ the act might be held to apply on the theory that the owner permitting the work to continue would be estopped from declaring against the lien.⁷

§ 8. **Construction of law.**—With the growth of the subject of mechanics' liens there has become a somewhat more liberal rule as to the construction to be placed upon these laws. This has been followed to some extent by all courts, yet in states which closely adhere to the common law rules, these statutes are considered to be in derogation of the common law and are strictly construed. This strict construction was always applied

Pennsylvania.—Church v. Davis
9 Watts, (Pa.) 304.

Texas.—Central & M. R. Co.
v. Henning, 52 Tex. 466.

Virginia.—Hendricks v. Fields,
26 Grat. (Va.) 447.

³ Vanderpool v. LaCrosse &
M. R. Co., 44 Wis. 652; Bitter v.
Mouat Lumber & Investment Co.
10 Col. App. 307, 51 Pac. 519;
Collum v. Pennsylvania Paint &
Ochre Co., 185 Pa. St. 411, 39
Atl. 1009; Howard v. American
Boiler Co., 68 Ill. App. 566; Mc-
Carthy v. Havis, 23 Fla. 508, 2
So. 819.

⁴ Trim v. Willoughby, 44 How.
Pr. (N. Y.) 189.

⁵ **Florida.**—Summerlin v.
Thompson, 31 Fla. 369, 12 So.
667.

Indiana.—Goodbub v. Horn-
ung's Estate, 127 Ind. 181, 26 N.
E. 770.

Kansas.—Nixon v. Cydon
Lodge No. 5, K. of P. 56 Kan.
298, 43 Pac. 237.

Massachusetts.—Donahy v.
Clapp, 66 Mass. (12 Cush.) 440.

Minnesota.—O'Neill v. St. Olaf's
School, 26 Minn. 329, 4 N. W. 47;
Wheaton v. Berg, 50 Minn. 525,
52 N. W. 926.

New York.—Sullivan v. Brew-
ster, 1 E. D. Smith, 8 How.
Pr. (N. Y.) 207; Hauptman v.
Catlin, 20 N. Y. 247.

⁶ Steinmetz's Ex'rs v. Boudi-
not, 3 Serg. & R. (Pa.) 541.

⁷ Kerckhoff-Cuzner Mill &
Lumber Co. v. Olmstead, 85 Cal.
80, 24 Pac. 648.

to the question whether or not the thing for which a lien was claimed came within the law, and more or less to matters of procedure.¹ And these strict constructionists hold that the act should not be extended beyond the letter of the statute, even if within the reason,² or the reasonable import of the words used.³ But the act should not be hypercritically interpreted.⁴ As to general contractors it is construed with equal favor.⁵ The growing view, and the one adopted by the newer states and even in many of the older states, is that the act should be

¹ **California.**—*Bottomly v. Grace Church*, 2 Cal. 90.

Connecticut.—*National Fire Proofing Co. v. Huntington* (Conn.) 71 Atl. 911.

Illinois.—*M. Pugh Co. v. Wallace*, 198 Ill. 422, 64 N. E. 1005; *Kewanee Boiler Co. v. Genoa Electric Co.*, 106 Ill. App. 230; *Belanger v. Hersey*, 90 Ill. 70; *Carney v. Tully*, 74 Ill. 375; *Canisus v. Merrill*, 65 Ill. 67; *Huntington v. Barton*, 64 Ill. 502.

Iowa.—*Greene v. Ely*, 2 G. Greene, (Ia.) 508; *Logan v. Attix*, 7 Clk (Ia.) 77.

Louisiana.—*Landry v. Blanchard*, 16 La. Ann. 173.

Michigan.—*Willard v. Magoon*, 30 Mich. 273; *Wagar v. Briscoe*, 38 Mich. 587.

Mississippi.—*Jones v. Alexander*, 10 Sm. & M. (Miss.) 627.

New Mexico.—*Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481.

New Jersey.—*Associates of Jersey County v. Davison*, 29 N. J. L. (5 Dutch.) 415.

New York.—*Dugan v. Brophy*, 55 How. Pr. (N. Y.) 121; *Roberts v. Fowler*, 4 Abb. Pr. (N. Y.) 263; *Mushlitt v. Silverman*, 50 N. Y. 360; *Dart v. Fitch*, 23 Hun (N. Y.) 361.

Pennsylvania.—*Appeal of McCay*, 37 Pa. St. 125.

Texas.—*McCreary v. Waco Lodge No. 70, I. O. O. F.*, 2 Posey, Unrep. Cas. (Tex.) 675.

Utah.—*Eccles Lumber Co. v. Martin*, 31 Utah, 241, 87 Pac. 713.

West Virginia.—*Mayes v. Ruffners*, 8 W. Va. 384.

Canada.—*Archibald v. Hubley*, 18 C. S. C. 116; *Haggerty v. Grant*, 2 B. C. 176; *Smith v. McIntosh*, 3 B. C. 28.

See Dec. Dig. tit *Mechanics' Liens*, sec. 5. Illinois Statute now declares law shall be liberally construed.

² *Brady v. Anderson*, 24 Ill. (14 Peck) 110; *Stephens v. Holmes*, 64 Ill. 336; *Joseph N. Elsendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178.

³ *Mushlett v. Silverman*, 50 N. Y. 360; *Eccles Lumber Co. v. Martin*, 31 Utah, 241, 87 Pac. 713.

⁴ *Hubbell v. Schreyer*, 15 Abb. Prac. (N. Y.) 300, 56 N. Y. 604; *Williamson v. Shank* (Ind. App.), 83 N. E. 641.

⁵ *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30; *Eccles Lumber Co. v. Martin*, 31 Utah, 241, 87 Pac. 713.

liberally construed, and many consider the entire statute of a remedial nature.⁶ This rule of liberal construction is adopted on the equitable principle that when labor or materials are put in a building they lose their identity and become part of the real estate and enhance its value, and it would be inequitable and unjust to deprive the owner of some remedy for his expended labor and materials and suffer another to retain them without cost,⁷ and hence a substantial compliance is all that is required.⁸ These courts say that they need not feel hampered by the early decisions, that the lien laws have now become a part of our jurisprudence and their equity and beneficence are conceded by all.⁹ And some of these courts while using the words "strict construction" have limited the use of the meaning of "strict construction" and have held that it cannot be applied to take advantage of technicalities to deprive the honest laborer of his reward, but such a "construction" will require only a "substantial compliance" with the statute,¹⁰ and that

⁶ **Arkansas.**—*White v. Chaffin*, 32 Ark. 59.

Mississippi.—*Sharpe v. Spengler*, 48 Miss. 360.

Missouri.—*Oster v. Rabeneau*, 46 Mo. 595; *DeWitt v. Smith*, 63 Mo. 263; *Baldwin v. Merrick*, 1 Mo. App. 281.

Nebraska.—*White Lake Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036.

North Dakota.—*Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036.

Ohio.—*Williams v. Miller*, 2 Ohio Dec. 119, 1 West. Law Month. 409.

Tennessee.—*S. B. Luttrell & Co. v. Knoxville L. & J. R. Co.* (Tenn.), 105 S. W. 565.

United States.—*Russell v.*

Hayner, 130 Fed. 90, 64 C. C. A. 424.

Alaska.—*Jorgensen Co. v. Sheldon*, 2 Alaska, 607.

District of Columbia.—*United States v. City Trust, Safe Deposit & Security Co.*, 21 App. D. C. 369; *Hooven, Owens & Rentschler Co. v. John Featherston's Sons*, 111 Fed. 81, 49 C. C. A. 229.

⁷ *Hooven, Owens & Rentschler Co. v. John Featherston's Sons*, 111 Fed. 91, 49 C. C. A. 229; *Hooven v. Featherston*, 68 Fed. 778, 15 C. C. A. 67, 32 U. S. App. 439.

⁸ *Springer Land Ass'n. v. Ford*, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. 170.

⁹ *Shaw v. Young*, 87 Me. 27, 32 Atl. 897.

¹⁰ *Minor v. Marshall*, 6 N. Mex. 194, 27 Pac. 481.

courts should not fritter away the law's meaning by construction.¹¹ If a statute be susceptible of two constructions, one consistent with natural equity and the other not, the courts should give the former construction to it.¹² The undoubted rule upon the question whether or not the labor or material furnished is within the act, is that there must be a substantial compliance showing that the act covers the labor or material for which the lien is claimed.¹³ Upon questions relating to procedure and the perfecting of the lien, the statute is always liberally construed.¹⁴ By reason of the constant changes, and dissimilarity of the statutes of different states, decisions of one state are not considered of as great a value in another as they otherwise might be, and the statute under

¹¹ *Malter v. Falcon M. Co.*, 18 Nev. 209, 212, 2 Pac. 50.

¹² *Lombard v. Trustees of the Young Men's Library Association fund*, 73 Ga. 323.

¹³ *Cary Hardware Co. v. McCarty*, 10 Col. App. 200, 50 Pac. 744.

¹⁴ **No rule of strict or liberal construction.**—Much of the seeming conflict in authority as to the rule for the construction of mechanic's lien statutes is more apparent than real. It arises in many instances from a neglect to scrutinize closely the special circumstances of the case under review and the particular part of the statute construed, and also from the fact, often overlooked, that there are material differences in the statutes of the various states. It is too frequently asserted broadly and hastily that mechanic's lien statutes are in derogation of the common law, and therefore subject to the well-known canon of

construction that they must be construed strictly. This is true as to parts of such statutes, but it also may be, and invariably is, the case as to the greater portion of the same statute that its provisions are remedial in their nature, and hence, according to a rule of construction equally well settled, should be liberally construed. If the facts of each case are thoroughly investigated with reference to this distinction the opinions of courts can be reconciled in many instances where they would appear at first glance to be in direct conflict. No inflexible rule of either strict or liberal construction can be laid down which will be applicable to every part of such a statute in the absence of the provisions, in the statute itself, as to how it should be construed.

Colorado.—*Cary Hardware Co. v. McCarty*, 10 Col. App. 200, 50 Pac. 746.

which a decision is rendered must usually be consulted to ascertain the weight to be given to any holding of the court.¹⁵ However, as to the principles involved, which are the same upon general questions, decisions of other states will have their due weight.¹⁶ The legislature cannot exercise judicial functions and declare what the law is or has been.¹⁷ When the legislature adopts a law from another state it may be presumed to know the construction placed upon the law by the courts of such state and to adopt it with the enactment of the law.¹⁸ Of course if the intention of the legislature is doubtful the courts would have the power to make clear its intention.¹⁹ Where a law has been construed and re-enacted it may be presumed that the legislature intended the new law should have the construction of the old one.²⁰ But in no case has the legislature power to contravene a constitutional provision.²¹

§ 9. To whom right granted to secure lien.—The power to obtain a lien being given by statute, of course, no one can ob-

Connecticut.—Chapin v. Persse & Brooks Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

Michigan.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466.

New York.—Hubbell v. Schreyer, 15 Abb. Prac. (N. S.) 300, 56 N. Y. 604.

Tennessee.—Steger v. Arctic Refrigerating Co., 89 Tenn. 453, 14 S. W. 1087; Nanz v. Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999, 47 L. R. A.; Thompson v. Baxter, 92 Tenn. 305, 21 S. W. 668.

¹⁵ Great Western Mfg. Co. v. Hunter Bros. 15 Neb. 36; Nanz v. Cumberland Gap Co., 103 Tenn. 299, 52 S. W. 999; Pacific Rolling Mills Co. v. James St.

Const. Co., 68 Fed. 966, 16 C. C. A. 68.

¹⁶ Aste v. Wilson, 14 Colo. App. 323, 59 Pac. 846; Nanz v. Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999.

¹⁷ Titusville Iron Works v. Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917.

¹⁸ Hunter v. Truckee Lodge, 14 Nev. 24.

¹⁹ O'Connor v. Warner, 4 Watts & S. (Pa.) 223.

²⁰ Kelley v. Northern Trust Co., 190 Ill. 401, 60 N. E. 585; Eccles Lumber Co. v. Martin, 31 Utah, 241, 87 Pac. 713.

²¹ Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. 663, 7 L. R. A. 777. See sec. 1.

tain a lien unless he comes within the provisions of the statute. The earlier lien laws were made to apply to a particular class of persons generally such as mechanics, artisans, etc. The later statutes, however, grant the power to obtain a lien to any person, and the words "any person" include artificial, as well as natural persons.¹ They also include domestic as well as foreign corporations,² non-residents,³ and partnerships.⁴ But in one case it was held that an administrator of a partnership was not included.⁵ Of course before a corporation can legally take advantage of the statute it must be doing that which is not ultra vires.⁶ Even where a statute granted the power to "any machinist," etc., to file a lien, it was held that it would apply to a corporation.⁷ But a municipal corporation does not come within the ordinary terms of the statute and to enable it to file a lien the authority must be expressly given.⁸ Of course the owner could not take a lien on his own property;⁹ and even where he was a member of a voluntary association his right to a lien was postponed to those who were not members.¹⁰ As to the capacity of a natural person

¹ *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320. See Dec. Dig. tit. Mechanics' Liens, sec. 8.

² *Georgia*.—*Loudon v. Coleman*, 59 Ga. 653.

Nebraska.—*Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320.

New York.—*Gaskell v. Beard*, 58 Hun 101, 11 N. Y. Supp. 399; *New York Architectural Terra Cotta Co. v. Williams*, 184 N. Y. 579, 77 N. E. 1192.

Oregon.—*Dallas Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Ore. 527.

Texas.—*Fagan v. Boyle Ice Mach. Co.*, 65 Tex. 324.

Utah.—*Doane v. Clinton*, 2 Utah, 417.

³ *Greenwood v. Tennessee Mfg. Co.*, 32 Tenn. 133-135; *Green-*

wood v. Tennessee Mfg. Co. & Agricultural School, 32 Tenn. (2 Swan) 130.

⁴ *Chambersburg Woolen Mfg. Co. v. Hazelet*, 3 Brewst. (Pa.) 98.

⁵ *Richardson v. O'Connell*, 88 Mo. App. 12.

⁶ *Dallas Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Ore. 527.

⁷ *Loudon v. Coleman*, 59 Ga. 653.

⁸ *Yates v. Meadville*, 56 Pa. St. 21; *Mauch Chunk v. Shartz*, 61 Pa. St. 399.

⁹ *Stevenson v. Stonehill*, 5 Whart. (Pa.) 301.

¹⁰ *Babb v. Reed*, 5 Rawle (Pa.) 151.

to take a lien the same rule is applied as in the making of contracts.¹¹

§ 10. Property that may be subject to a lien.—Again we are obliged to look to the statute to ascertain whether or not a certain kind of property is liable to a lien, but it is to be understood that the lien does not cover all property falling within the broad designation of the statute. There are certain kinds of property that by reason of the uses to which they are put, public policy will not permit a lien attaching to. Most prominent of this kind of property is that which belongs to a public or quasi public corporation and which is necessary to the performance of its public duties. Such property is also exonerated from seizure on execution.¹ The remedy for collection of money expended in the betterment of such property is usually that of mandamus,² and in some jurisdictions by a sequestration of the earnings.³ The corporation within this exception must be in fact a public one.⁴ Merely because it is used by the public will not do, as, for example, the property of a church,⁵ or a college,^{5a} even where it was stipulated that they should not be

¹¹ *Fagin v. Boyle*, 65 Tex. 324; *Husted v. Mather*, 77 N. Y. 388; *Donahy v. Clapp*, 12 Cush. (Mass.) 440.

¹ *Indiana*.—*Kentucky Lead & Oil Co. v. New Albany Waterworks*, 62 Ind. 63.

Iowa.—*Thompson v. Stephens*, 131 Iowa 51, 107 N. W. 1095.

Kentucky.—*Ausbeck v. Schar dien*, 20 Ky. 178, 45 S. W. 507.

Pennsylvania.—*Guest v. Lower Merion Water Co.*, 142 Pa. 610, 21 Atl. 1001, 28 W. N. C. 285; *McLeod v. Central Normal School Ass'n. of Pennsylvania* 152 Pa. 575, 25 Atl. 1109, 32 Wkly. Notes Cas. 37.

United States.—*McNeal Pipe*

& Foundry Co. v. Bullock (C. C.) 38 Fed. 565, also 566.

See Dec. Dig. tit. Mechanics' Liens, § 9.

² *Arrison v. Company D*, 12 N. Dak. 554, 98 N. W. 83.

³ *Foster v. Fowler*, 60 Pa. (10 P. F. Smith) 27.

⁴ *Arrison v. Company D*, 12 N. Dak. 554, 98 N. W. 83; *Board of Education of Illinois v. Grenebaum*, 39 Ill. 609. See Dec. Dig. tit. Corporations, § 12.

⁵ *Jones v. Trustees of Congregation of Mount Zion*, 30 La. Ann. 711; *Presbyterian Church v. Allian*, 10 Pa. 413.

^{5a} *Ray County Sav. Bank v. Cramer*, 54 Mo. App. 587.

encumbered, are not exempted.⁶ Then there are some kinds of property whose use excludes the idea that they are embraced within the law, as, for example, railroad lands,⁷ or depots erected thereon.⁸ But in an Ohio case it was held that the lien would attach to a railroad bridge,⁹ and in another case to a street railway stable.¹⁰ But a street railroad power house was held not subject to a lien.¹¹ In the latter case, however, the fee was in the public. There is no principle of public policy which forbids a state to enact laws specially subjecting railroad property to mechanic's liens.¹¹ Neither the valves,¹² pipes,¹³ nor plant of a waterworks supplying the city with water are subject to a lien.¹⁴ A United States Court, following a Wisconsin decision which was afterwards overruled, decided that

⁶ *University of Lewisburg v. Reber*, 43 Pa. (7 Wright) 305.

⁷ *Schulenburg v. Memphis, C. & N. W. R. Co.*, 67 Mo. 442.

⁸ *Skrainka v. Rohan*, 18 Mo. App. 340.

⁹ 41 Ohio St. 37, 52 Am. Rep. 66. Statute must so provide. *Nill v. LaCrosse & M. R. Co.*, 11 Wis. 223; *Purtell v. Chicago Forge & Bolt Co.*, 74 Wis. 132, 42 N. W. 265.

¹⁰ *McIlvain v. Hestonville & M. R. Co.*, 5 Phila. (Pa.) 13; *Oberholtzer v. Norristown Pass. Ry. Co.* (Com. Pl.) 16 Pa. Co. Ct. R. 13.

¹¹ *Purtell v. Chicago Forge & Bolt Co.*, 74 Wis. 132, 42 N. W. 265.

¹² *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 60 N. W. 1004, 46 Am. St. 830.

¹³ *McNeal Pipe & Foundry Co. v. Bullock (C. C.)* 38 Fed. 565; *Kentucky Lead & Oil Co. v. New Albany Waterworks*, 62 Ind. 63.

¹⁴ *Chapman Valve Mfg. Co. v.*

Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. 830.

Embryo Corporations.—Plaintiffs had contracted to build a factory for \$4,500, the contract being that as soon as \$4,500 was subscribed, the subscribers should become incorporated, with a capital stock of \$4,500 divided into shares of \$100 each, to be distributed among the subscribers according to the amount of their subscriptions. The subscriptions of the defendants ran from \$50 to \$300. In addition to these subscriptions, one C. gave a lot for the building for two shares of stock. There being only \$3,225 paid in, the builder took a mechanic's lien on the building and lot, and brought suit for a personal judgment against all the subscribers jointly, and to foreclose the mechanic's lien. It was held that the lot subscribed became the property of all subscribers within the meaning of the mechanic's lien law, and was

a lien could attach to a waterworks designed to supply a city.¹⁵ This is contrary to the usual rule, however.¹⁶ If, however, the plant has not yet been accepted by the city, the lien would attach.¹⁷ The fact that a receiver has been appointed will not prevent the property being subjected to a lien.¹⁸ As a general rule the lien will not attach to the building separate from the land upon which it is located.¹⁹ So it has been held there is no lien for tearing down a building, because there is nothing added to the land.²⁰ The presumption is, that property of a public nature is not subject to the lien, and it will take an express statutory provision to make it subject to the lien.²¹ As exemplifying the strictness of the rule adopted, a statute which provided that it should apply to "all buildings," and to "cor-

therefore bound by and subject to the mechanic's lien. *Burnap v. Sylvania Butter Co.*, 7 Ohio N. P. 217, 1 Ohio S. & C. P. Dec. 107. This decision was reversed by the Circuit Court. 12 O. C. C. 639.

¹⁵ *National Foundry Co. & Pipe Works v. Oconto Water Co.* (C.C.) 52 Fed. 43; *Oconto Water Co. v. National Foundry & Pipe Works* (1893), 59 Fed. 19, 7 C. C. A. 603, 18 U. S. App. 380.

¹⁶ *Badger Lumber Co. v. Marion Water Supply E. L. & P. Co.*, 48 Kan. 182, also 48 Kan. 187, 30 Pac. 117, 30 Am. St. 306; *Southern Electrical Supply Co. v. Rolla Electric Light & Power Co.*, 75 Mo. App. 622.

¹⁷ *McNeal Pipe & Foundry Co. v. Howland*, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; *Pittsburg Testing Laboratory v. Milwaukee Electric Ry. & Light Co.*, 110 Wis. 633, 86 N. W. 592; *Salem v. Lane & Bodley Co.*, 90 Ill. App. 560.

¹⁸ *In re Simonds Furnace Co.*,

61 N. Y. Supp. 974, 30 Misc. (N. Y.) 209.

¹⁹ *Belding v. Cushing*, 67 Mass. (1 Gray) 576. In *Gull River v. Briggs*, 9 N. D. 485, 84 N. W. 349 under a former law of North Dakota, it was held, where a person only had a leasehold interest, which was forfeited, the lien might be enforced, and the building sold and removed. *Leaver v. Kilmer*, 71 N. J. 291; 59 A. 643; *Brunner v. Picking*, 75 Ill. App. 393; *Arnold v. Campbell*, 3 In. Ter. 550, 64 S. W. 532.

²⁰ *Holzhour v. Meer*, 59 Mo. 434.

²¹ *Georgia*.—*Albany v. Lynch*, 119 Ga. 491; 46 S. E. 622.

Iowa.—*Lewis v. Chickasaw County*, 50 Iowa, 234. *Whiting v. Story County*, 54 Iowa, 81; 6 N. W. 137, 37 Am. Rep. 189.

Illinois.—*Salem v. Lane & Bodley Co.*, 90 Ill. App. 560.

Maine.—*A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436; 57 A. 581.

porations as well as individuals," was held not to extend to the property of municipal corporations.²² As examples of what have been held excluded may be mentioned a court house,²³

Michigan.—Knapp v. Swaney, 56 Mich. 345; 23 N. W. 162; 56 Am. Rep. 397.

Mississippi. — Panola County Sup'rs v. Gillen, 59 Miss. 198.

Nebraska.—Ripley v. Gage County Com'rs, 3 Neb. 397.

New York.—Tice v. Atlantic Const. Co., 65 N. Y. Supp. 79; 52 App. Div. 284.

Oregon.—Portland Lumbering & Mfg. Co. v. School Dist. No. 1, 13 Ore. 283, 10 Pac. 350.

Pennsylvania.—Wilson v. Huntingdon County Com'rs, 7 Watts & S. (Pa.) 197.

Texas.—Atascosa Co. v. Angus, 83 Tex. 202; 18 S. W. 563; 29 Am. St. Rep. 637.

City of Dallas v. Loonie, 83 Tex. 291, 18 S. W. 726.

Herring-Hall-Marvin Co. v. Kroeger, 23 Tex. Civ. App. 672; 57 S. W. 980.

Virginia.—Phillips v. Rector, etc., of University of Virginia, 97 Va. 472; 34 S. E. 66; 47 L. R. A. 284; Hicks v. Roanoke Brick Co., 94 Va. 741; 27 S. E. 596.

Wisconsin.—Wilkinson v. Hoffman, 61 Wis. 637; 21 N. W. 816.

West Virginia.—Hall's Safe & Lock Co. v. Scites, 38 W. Va. 691; 18 S. E. 895.

Reason for not allowing.—It is easy to see what detriment might follow if lands and buildings held for public uses, as for instance, for parks, court-houses, jails, town halls, or common schools,

could be sold to satisfy the debts or defaults of municipal corporations having the legal title. The public uses would be thereby annihilated. Courts have presumed that this could not have been intended, and accordingly have decided, as a matter of public policy, that lands or buildings so held are not subject to mechanic's liens.

Ferguson v. Neilson, 17 R. I. 81; 33 Am. St. 855.

State not included.—It is an established canon of statutory construction that the state is not to be considered as within the purview of a statute unless expressly named therein, however general and comprehensive the language otherwise; as a corollary public buildings constructed by the state or a political subdivision of the state and not for pecuniary profit, are not considered within the purview of a statute imposing liens on buildings in certain cases, unless they are expressly named.

A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436; 57 A. 581. See cases cited in 35 L. R. A. 141.

²² George W. Emory & Co. v. Commissioners of Town of Laurel, 3 Pennewill, 67; 55 A. 118.

²³ Bouton v. McDonough County Sup'rs, 84 Ill. 384; Parke County Com'rs v. O'Connor, 86 Ind. 531; 44 Am. Rep. 338. Burlington Manuf'g Co. v. Board of

a county bridge,²⁴ a lunatic asylum,²⁵ a fire bell,²⁶ a public library,²⁷ and school buildings.²⁸ Some States have forbid-

Courthouse & City Hall Com'rs, 67 Minn. 327; 69 N. W. 1091. *Snow v. Durham County Com'rs*, 112 N. C. 335; 17 S. E. 176. *Atascosa County v. Angus*, 83 Tex. 202, 18 S. W. 563; 29 Am. St. Rep. 637. In *(Jewell County Com'rs v. Snodgrass & Young Mfg. Co.)*, 52 Kan. 253; 34 Pac. 741) the contrary was held because no reservation was made in the code.

²⁴ *Pike County Com'rs v. Norrington*, 82 Ind. 190. *Loring v. Small*, 50 Iowa 271; 32 Am. Rep. 136. *First Nat. Bank v. Malheur County*, 45 Pac. 781. *McPheeters v. Merrimac Bridge Co.*, 28 Mo. 467.

²⁵ *People v. Butler*, 2 Neb. 5.

²⁶ *Leonard v. Reynolds*, 7 Hun, 73 (N. Y.).

²⁷ *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436; 57 A. 571. *Young v. Inhabitants of Falmouth*, 183 Mass. 80; 66 N. E. 419.

²⁸ *Colorado*.—*Florman v. School Dist. No. 11, El Paso County*, 6 Colo. App. 319, 40 Pac. 469.

Illinois.—Board of Education of Dist. No. 3 v. Neidenberger, 78 Ill. 58. *Quinn v. Allen*, 85 Ill. 39. *Thomas v. Board of Education of Urbana School Dist.* 71 Ill. 283. *Thomas v. Trustees of Illinois Industrial University*, 71 Ill. 310.

Indiana.—*Fatout v. School Com'rs*, 102 Ind. 223, 1 N. E. 389.

Iowa.—*Charnock v. District*

Tp. of Colfax, 51 Iowa, 70, 50 N. W. 286; 33 Am. Rep. 116.

Massachusetts.—*Staples v. City of Somerville*, 176 Mass. 237; 57 N. E. 380. *Lessard v. Town of Revere*, 171 Mass. 294; 50 N. E. 533.

Minnesota.—*Jordan v. Board of Education of Taylor's Falls*, 39 Minn. 298; 39 N. W. 801.

Missouri.—*Abercromble v. Elv*, 60 Mo. 23. *Hastings v. Woods*, 2 Mo. App. 148.

Montana.—*Whiteside v. School Dist. No. 5 of Flathead County*, 20 Mont. 44; 49 Pac. 445.

New York.—*Brinckerhoff v. Board of Education of New York*, 37 How. Prac. (N. Y.) 499; 6 Abb. Prac. (N. S.) 428. *Poillon v. City of New York*, 47 N. Y. 666. *Terwilliger v. Wheeler*, 81 N. Y. S. 173, 81 App. Div. 460.

Pennsylvania.—*Williams v. Controllers of Public Schools of First School Dist.* 18 Pa. 275.

Utah.—Board of Education of Salt Lake City v. Salt Lake Pressed Brick Co., 13 Utah, 211; 44 Pac. 709.

United States.—*Missouri v. Tiedermann*, 10 Fed. 20, 3 McCrary 399. Schoolhouse liable on the ground that statute makes no exception. *Moore v. Protestant School Dist.* 5 Man. L. R. 49.

Vermont.—*Greenough v. Nichols*, 30 Vt. 768. A state reform school building is not liable. *Patterson v. Pennsylvania Reform School*, 92 Pa. 229.

den a lien on public buildings in their constitutions.²⁹ But if not forbidden by the constitution and the statute is express, the property will be subject to a lien.³⁰ Homesteads and exempted property under homestead laws are liable the same as other property, the law deeming it more equitable to protect the man who puts his labor or money into the property, than to preserve it for the family.³¹ The intent to exempt this property from the operation of the mechanic's lien law must be expressly declared by the statute³² or the constitution.³³ Where the law makes a homestead exempt from sale, it must be declared as a homestead before the lien is filed.³⁴ But the lien cannot attach to land acquired under the United States homestead act, before the patent is issued. In some few cases it is held that the mechanic cannot have his lien if he knows the property upon which he is placing his work or materials is a homestead.³⁵ In other states in order to hold a

²⁹ *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451.

³⁰ *Commissioners of Public Instruction of City of Trenton v. Fell*, 52 N. J. Eq. 689, 29 Atl. 816; *Bell v. City of New York*, 105 N. Y. 139, 11 N. E. 495; *Hovey v. Town of East Providence*, 17 R. I. 80, 20 Atl. 205, 9 L. R. A. 156.

³¹ *Alabama*.—*Tyler v. Jewett*, 82 Ala. 93, 2 So. 905; *McAnally v. Hawkins Lumber Co.*, 109 Ala. 397, 19 So. 417.

Arkansas.—*Anderson v. Seamans*, 49 Ark. 475, 5 S. W. 799; *Murray v. Rapley*, 30 Ark. 568.

Pennsylvania.—*Appeal of Laucks*, 24 Pa. 426.

Tennessee.—*Thompson v. Wickersham*, 68 Tenn. (9 Baxt.) 216.

Washington.—*Parsons v. Pearson*, 9 Wash. 48, 36 Pac. 974. See Dec. Dig. tit. Mechanic's Lien,

§ 14. *Tinsley v. Boykin*, 46 Tex. 592.

³² *Richards v. Shear*, 70 Cal. 186, 11 Pac. 607; *Walsh v. McMenomy*, 74 Cal. 356; 16 Pac. 17; wife estopped—*Roane v. Murphy* (Tex. Civ. App.), 96 S. W. 782.

³³ *Cogel v. Mickow*, 11 Minn. 475 (Gil. 354); *Tuttle v. Howe*, 14 Minn. 145 (Gil. 113), 100 Am. Dec. 205; *Keller v. Struck*, 31 Minn. 446, 18 N. W. 280; *Coleman v. Ballandi*, 22 Minn. 144; conflict with constitution—*Volker-Schowcroft Lumber Co. v. Vance*, 32 Utah 74, 88 Pac. 896.

³⁴ *Walsh v. McMenomy*, 74 Cal. 356, 16 Pac. 17; *Parsons v. Pearson*, 9 Wash. 48, 36 Pac. 974; restricted to one acre—*People's Independent Rice Mill Co. v. Venoit*, 117 La. 999, 42 So. 480.

³⁵ *Kansas Lumber Co. v. Jones*, 32 Kan. 195, 4 Pac. 74; *Paige v.*

lien on the homestead the contract must be in writing.³⁶ Formerly it was questionable whether a married woman's property could be subjected to a lien, but now generally she is given full power to contract and her property is liable.³⁷ In cases where the statute does not grant a lien because of public policy or any of the reasons hereinbefore stated, the mechanic cannot enforce his claim by holding possession of the property until paid.³⁸

§ 11. Quantity of Interest or Estate Subject to Lien.—It may be stated as a general rule that whatever interest or ownership the person making the contract¹ with the mechanic has in the land upon which the building is to be erected, can be subjected to the lien. The statutes generally use the word "owner" as indicating what degree of interest or estate in the land is sufficient to be subjected to a lien. This word "owner" is a word of common parlance and ordinarily defined as one

Peters, 70 Wis. 178, 35 N. W. 328, 5 Am. St. Rep. 156; Haldeman v. McDonald (Tex. Civ. App.), 58 S. W. 1040.

³⁶ *McAlister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887, 9 Detroit Leg. N. 645.

Pews in Church.—A church is a "building" within Hill's Ann Laws, 3669, giving a lien for material furnished and used in construction of any "building" and is not exempted by sec. 282, subd. 5, providing that pews occupied by householders or their families, in a place of public worship, shall be exempt. *Harrisburg Lumber Co. v. Washburn*, 29 Ore. 150, 44 Pac. 390. Building sold separately—*Holliday v. Matheson*, 146 Mich. 336, 109 N. W. 669, 13 Detroit Leg. N. 816.

³⁷ *Smith v. Gauby*, 43 Fla. 683,

30 So. 683; *O'Neill v. Percival*, 20 Fla. 937, 51 Am. Rep. 634; *MacFarlane v. Southern Lumber & Supply Co.*, 47 Fla. 277, 36 So. 1029; *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890.

³⁸ *City of Platteville v. Bell*, 66 Wis. 326, 28 N. W. 404. Where the owner of a homestead voluntarily incumbers it in the manner prescribed by Rev. St. 1898, sec. 1155, by giving a material man furnishing materials for an improvement thereon a lien therefor, the material man acquires a lien not by virtue of the statute creating a lien, but by virtue of the contract. *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah 74, 88 Pac. 896.

¹ *Jones v. Walker*, 63 N. Y. 612; *Zeigler v. Galvin*, 45 Hun (N. Y.) 44; *King v. Smith*, 42 Minn. 286.

having dominion over a thing,² which ownership is held to include a fee simple, an estate for life or any less estate than a fee.³ As a general rule it may be said that if the contracting owner has an interest which he can convey,⁴ or mortgage,⁵ he has such an interest as may be subjected to a lien. The inchoate right of dower,⁶ or curtesy, is not subject to a lien.⁷ But after it has been assigned it may be.⁸ A guardian is not an owner within the law,⁹ neither is a mortgagee unless he is in possession.¹⁰ A minor not being able to contract, cannot make his property subject to a lien unless he ratifies the contract after he reaches his majority.¹¹ The fact that there is a mortgage will not prevent the mortgagor from making the property subject to a lien, and this though proceedings to foreclose are pending.¹² Where there is a valid contract to convey and build, the purchaser of land has an equitable title to which the lien can attach, though the legal title has not passed to him.¹³ Thus where one person owns the land and

44 N. W. 65. See Dec. Dig. Estates or interest subject to lien, § 15. See § 132.

² Benjamin v. Wilson, 34 Minn. 520, 26 N. W. 725; Fresno Loan & Savings Bank v. Husted (Cal.), 49 Pac. 194.

³ Arkansas.—White v. Chaffin, 32 Ark. 59.

Illinois.—Tracey v. Rogers, 69 Ill. 662.

Indiana.—Littlejohn v. Millirons, 7 Ind. 125.

Kansas.—Hathaway v. Davis, 32 Kan. 693, 5 Pac. 120.

Minnesota.—Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725.

Ohio.—Choteau v. Thompson, 2 Ohio S. 114.

⁴ Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

⁵ Littlejohn v. Millirons, 7 Ind. 125; Tracy v. Rogers, 69 Ill. 662.

⁶ Gove v. Cather, 23 Ill. 585; Bishop v. Bogle, 9 Ind. 169; Johnson v. Dahlgren, 14 Misc. (N. Y.) 623, 36 N. Y. Supp. 806; Van Vronker v. Eastman, 7 Metc. (Mass.) 157.

⁷ Spinning v. Blackburn, 13 Ohio St. 131.

⁸ Redman v. Williamson, 2 Iowa 488.

⁹ Copley v. O'Neil, 57 Barb. (N. Y.) 299.

¹⁰ Cox v. Burderick, 4 E. D. Smith, (N. Y.) 721; Ombony v. Jones, 19 N. Y. 234.

¹¹ Alvery v. Reed, 115 Ind. 148; McCarty v. Carer, 49 Ill. 53.

¹² Green v. Sprague, 120 Ill. 416, 11 N. E. 859.

¹³ Packard v. Sugarman, 66 N. Y. Supp. 30, 31 Misc. (N. Y.) 623.

he agrees with another that he shall erect a building that shall be used by them jointly,¹⁴ or where one is in possession under contract of purchase, the lien may attach.¹⁵ The fact that the contracting owner might lose his interest before trial,¹⁶ or go into bankruptcy,¹⁷ will not relieve the property from liability to a lien.¹⁸ As a general rule it may be said that any equitable interest is subject to the lien.¹⁹ This would include all trust estates.²⁰ Usually, even where not so specified in the statute, a leasehold interest is subject to a lien,²¹ even if it be an estate for years

¹⁴ *Hooker v. McGlone*, 42 Conn. 95; *Miller v. Schmitt*, 67 N. Y. Supp. 1077.

¹⁵ *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Short v. Stephens*, 92 Mo. App. 151.

¹⁶ *Sawyer-Austin Lumber Co. v. Clark*, 82 Mo. App. 225.

¹⁷ *Keller v. Denmead*, 68 Pa. (18 P. F. Smith) 449.

¹⁸ *Goldheim v. Clark*, 68 Md. 498, 13 Atl. 363.

¹⁹ *Goldheim v. Clark*, 68 Md. 498, 13 Atl. 363; *Atkins v. Little*, 17 Minn. 342 (Gil. 320); *Kellar v. Denmead*, 68 Pa. St. 449. See Dec. Dig. tit. Mechanics' Liens, § 18. The contrary has been held in New Jersey; *Dalrymple v. Ramsey*, 45 N. J. Eq. (18 Stew.) 494, 18 Atl. 105.

²⁰ *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397. See Dec. Dig. tit. Mechanics' Liens, § 21. The reason assigned is because it is a chattel interest; there is a strong dissenting opinion. A husband's interest in a lease for an unexpired term of 999 years owned by his wife, can not be subjected to the lien. *Flannery v. Rohrmayer*, 49 Conn. 27.

Investment of trust funds.—A fund held for the use of a married woman, the principal at her death to go to her minor son, was ordered by the court to be invested in improved city property. On the occupied land selected A. agreed to erect some buildings, to be paid for out of the fund, the agreed price for which was added to the consideration in the deed of the land. Held, that A. could enforce payment out of the land so purchased, and the expense should be borne by the widow and son proportionately to their shares. *Carey v. Kemper*, 40 Ohio St. 79.

Occupying claimant.—The lien attaches to any equitable interest in the land growing out of the amelioration thereof by the debtor, and any right he may have under the statute protecting occupying claimants. *Dakin v. Lecklider*, 19 Ohio C. C. R. 254, 10 O. C. D. 308.

²¹ **Alabama.**—*Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84.

Arkansas.—*Meek v. Parker*, 63 Ark. 367, 38 S. W. 900.

only,²² or for months.²³ This is true where the lease is in parol, even though required to be in writing, if it is partly performed.²⁴ The fact that it is upon ground rent for a specified time will not change the rule.²⁵ And it may be enforced against the lessee's assignee,²⁶ nothing but the lessee's interest being liable.²⁷ Where the lease permits a removal of buildings at the end of the term the lien will attach.²⁸ Where the statute requires the lease to be in writing as a condition precedent, as a matter of course the lien will not attach if the lease is not written.²⁹

Illinois.—Gardner v. Watson, 18 Ill. App. 386; Watson v. Gardner, 119 Ill. 312, 10 N. E. 192; Chicago Smokeless Fuel Gas Co. v. Lyman, 62 Ill. App. 538.

Kansas.—Hathaway v. Davis, 32 Kan. 693, 5 Pac. 29.

Oklahoma.—Jarrell v. Block (Okla.), 92 Pac. 167.

West Virginia.—Showalter v. Lowndes, 56 W. Va. 462, 49 S. E. 448. Oil or gas well—Eastern Ohio Oil Co. v. McElroy, 75 Kan. 515, 89 Pac. 1048; Phillips v. Springfield Crude Oil Co., 76 Kan. 783, 92 Pac. 1119. See Dec. Dig. Leaseholds, § 20.

²² Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725; Haworth v. Wallace, 14 Pa. (2 Harris) 118.

Lessee of school land—Owner.—Block v. Pearson (Okla.), 91 Pac. 714.

²³ Deatherage v. Sheldley, 50 Mo. App. 490.

²⁴ O'Brien v. Meyer (Sup. Ct. Con.), 9 Wkly. Law Bul. 337, 8 Ohio Dec. 777.

²⁵ Gaule v. Bilyeau, 25 Pa. 521.

²⁶ Daniel v. Weaver, 73 Tenn. (5 Lea.) 392.

²⁷ Jones v. Carey-Lombard Lumber Co., 87 Ill. App. 533; Crutcher v. Block (Okla.), 91 Pac. 895.

²⁸ Zabriskie v. Greater America Exposition Co., 67 Neb. 581, 93 N. W. 958.

Lessor not owner.—The lessor in a lease which provides that certain repairs shall be made by lessee, and the cost deducted from rent, is not the owner, as regards persons employed by lessee. Garling v. Hunt, 27 Ont. 149.

²⁹ **Executory contract.**—Where lands are sold under an executory contract which provides that the agreement may be avoided on the failure of the vendee to make certain payments, and the vendee has a building erected thereon with the consent of the vendor, and the contract of sale is forfeited, the contractor erecting the building is entitled to a mechanic's lien on the property. Beck v. Catholic University, 67

N. Y. Supp. 305, also 306, 32 Misc. (N. Y.) 567; Dame's Appeal, 62 Pa. St. 417.

Unavailing stipulation.—A provision in a 99-year lease "that it is agreed and notice is hereby given that no transfer, assignment, mortgage, judgment, mechanic's lien, or other lien shall

in any manner affect the lessor of said premises or his lien on the interest of the lessee for payment of rent," was unavailing to prevent the lessor's interest being made subject to a mechanic's lien. *Provost v. Skirk*, 223 Ill. 468, 79 N. E. 178.

CHAPTER 2.

CONDITIONS GIVING RIGHT TO A LIEN.

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| Sec. | Sec. |
| 12. Character of "building," "repair," etc., giving a lien. | 37. Contract—Express or implied—Wife's property. |
| 13. Character of "building," "repair," etc., giving a lien.—Continued. | 38. Contract with married women—Executor's right—Ohio statute. |
| 14. Character of "building," fixtures. | 39. Contract with married women—Continued. |
| 15. Character of "building."—Appurtenances. | 40. Contract—Ratification. |
| 16. Kind of services giving a lien. | 41. Contract—Filing notice. |
| 17. Kind of services on building. | 42. Notice from owner to prevent lien. |
| 18. Kind of material giving a lien. | 43. Persons entitled to lien by direct contract. |
| 19. Kind of material used in building. | 44. Contractor's lien—Ohio statute. |
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- tract as affecting sub-contractors—Stipulations in contract.
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69. Wrongful payment by owner—Ohio statute.
70. Wrongful payment by owner—Ohio statute—What are advance payments.

§ 12. Character of "building," "repair," etc., giving a lien.—

In the previous sections we have considered the general nature of the lien,¹ the persons entitled to such a lien, and the property subject thereto.² We now come to consider what conditions are necessary to give a right to a lien. Here as elsewhere the statute must be consulted in determining whether or not the building or improvement for which the lien is claimed comes within the statute. It is a general rule that in order that the building improvement may be such as to give the right to a lien thereon, it must be something which becomes a part of the real estate upon which it is located.³ The real estate is made liable on the theory that the

¹ §§ 1-8.

² § 11.

³ **Georgia**.—*Schofield & Son v. Stout, Mills Temple*, 59 Ga. 537; *Evans v. Beddingfield*, 106 Ga. 755, 32 S. E. 664.

Illinois.—*Cox v. Colles*, 17 Ill. App. (17 Bradw.) 503.

Maine.—*Baker v. Fessenden*, 71 Me. 292, 65 Me. 162.

Massachusetts.—*Kelley v.*

Border City Mills, 126 Mass. 148; *Turner v. Wentworth*, 119 Mass. 459.

New Hampshire.—*Tompson Mfg. Co. v. Smith*, 67 N. H. 409, 29 Atl. 405, 68 Am. St. Rep. 679.

Pennsylvania.—*Dickey's Appeal*, 115 Pa. 73, 7 Atl. 577; *Haslett v. Gillespie*, 95 Pa. 371.

Washington.—*Vendome Turkish*

material or labor for which the lien is claimed adds some value to the land.⁴ It is not necessary that the building should be a new building,⁵ or one that is finished.⁶ Ordinarily the structure must stand upon the land upon which the lien is claimed.⁷ But if the statute so provides there may be a lien for other services, such as dredging, etc.⁸ It has been held that an electric lighting apparatus, railway and power house are not included in the term "house" or "structure,"⁹ and that the word "building" does not include fences and gates.¹⁰ The

Bath Co. v. Schettler, 2 Wash. St. 457, 27 Pac. 76; *Kellog v. Little*, 1 Wash. 407, 25 Pac. 461.

United States.—*Greenwood, &c., Ry. v. Strang* (C. C.), 77 Fed. 498. See Dec. Dig. tit. Mechanics' Liens, § 23.

⁴ *Coddington v. Dry Dock Co.*, 2 Vroom (N. J.) 489; *Campbell v. John Taylor Mfg. Co.*, 62 N. J. Eq. 307; *DeWald v. Woog*, 158 Pa. 497, 499; *Parrish's Appeal*, 83 Pa. 111; *Holzhour v. Meer*, 59 Mo. 436.

⁵ *Reilly v. Hudson*, 62 Mo. 383; *White v. Chaffin*, 32 Ark. 59.

⁶ **Completed Structure.**—Defendant completed a pipe line and then planned to construct a canal, of six times greater capacity, to run from the river to the head waters of the pipe line, and then to follow the line of the pipe line for a considerable distance, after which he intended to take up the pipe line, but he constructed the canal only to said head waters. The canal, as built, was a completed structure, within Code Civ. Prov. 1183, entitling a furnisher of materials therefor to a mechanic's lien thereon without claiming a lien on the pipe line.

Pacific Rolling-Mill Co. v. Bear Val. Irr. Co., 120 Cal. 94, 52 Pac. 136.

⁷ *Coddington v. Beebe*, 31, 2 Vroom (N. J. L.) 477. See Dec. Dig. tit. Mechanics' Liens, § 24.

⁸ *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77. Sec. 44, Ohio Statute as to Ditches.

⁹ *Industrial & Mining Guaranty Co. v. Electrical Supply Co.*, 58 Fed. 732, 7 C. C. A. 471, 16 U. S. App. 196; *Bates Mach. Co. v. Trenton & N. B. R. Co.*, 70 N. J. L. 684, 58 Atl. 935.

¹⁰ **Building defined.**—The word "building" cannot be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense it can mean only an erection intended for use and occupation as a habitation or some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. That the word building was used in this sense in the statutes above cited, and did not comprehend every species of erection on land, is strongly implied by St. 1885, c. 431, in which the word "struc-

word "structure" includes a building,¹¹ and an oil well;¹² but a vessel,¹³ a cook oven,¹⁴ a lime kiln,¹⁵ and a bridge are not comprehended within the term "building" or "structure."¹⁶ Neither is a ditch,¹⁷ nor a swing,¹⁸ nor a railroad bridge, a "dwelling house" or "building,"¹⁹ although the latter might be included in the term "other structure."²⁰ A smelter comes within the term "mill" or "manufactory,"²¹ and a wind mill is an "improvement,"²² or "appurtenance."²³ Under some statutes wharf boats,²⁴ and floating docks have been held subject to a lien,²⁵ and even poles set in the ground and wires suspended for transmission of electricity have been said to come within the term "structure."²⁶ A mine or pit sunk in a mining claim,²⁷ and a boiler house, forming part of a plant of an oil mill were held to come within the term "building."²⁸

ture" is added to the word "building," in giving a lien for labor and materials. *Truesdell v. Gay*, 13 Gray (Mass.) 312.

¹¹ *Collins v. Drew*, 6 Daly 234, affirmed (1876) 67 N. Y. 149.

¹² *Showalter v. Lowndes*, 56 W. Va. 462, 49 S. E. 448.

¹³ *Stewart v. Gorgoza* (U. S.), 3 Hughes 459, Fed. Cas. No. 13, 428.

¹⁴ *Central Trust Co. v. Cameron Iron & Coal Co.*, 47 Fed. 136.

¹⁵ *Cowdrick v. Morris* (Com. Pl.) 9 Pa. C. C. R. 312.

¹⁶ *Burt v. Washington*, 3 Cal. 246; *Pike County Com'rs v. Norrington*, 82 Ind. 190; *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559.

¹⁷ *Ellison v. Jackson Water Co.*, 12 Cal. 542.

¹⁸ *Lothian v. Wood*, 55 Cal. 159.

¹⁹ *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 119, 78 Am. Dec. 691.

²⁰ *Ban v. Columbia Southern Ry. Co.*, 117 Fed. 21, 54 C. C. A. 407.

²¹ *McAllister v. Benson Mining & Smelting Co.*, 2 Ariz. 350, 16 Pac. 271.

²² *Phelps & Bigelow Windmill Co. v. Baker*, 49 Kan. 434, 30 Pac. 472.

²³ *Phelps & Bigelow Windmill v. Shay*, 32 Neb. 19, 48 N. W. 896.

²⁴ *Galbreath v. Davidson*, 25 Ark. 490, 99 Am. Dec. 233; *Burt v. Washington*, 3 Cal. 246; *Olmstead v. McNall*, 7 Blackf. (Ind.) 387.

²⁵ *Coddington v. Beebe*, 31, 2 Vroom (N. J. L.) 477.

²⁶ *Forbes v. Willamette Falls Electric Co.*, 19 Ore. 61, 23 Pac. 670, 20 Am. St. Rep. 793.

²⁷ *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352.

²⁸ *Short v. Miller*, 120 Pa. 470, 14 Atl. 374.

So does a railroad depot.²⁹ To come within the meaning of an "appurtenance," it must be an appurtenance to the land upon which the improvement is made and not an appurtenance to some other structure.³⁰ A remodeled building comes within the term "erected and constructed;"³¹ but adding a basement,³² or a bath room,³³ or a door, does not.³⁴ Where an old building is substituted in place of another, it is not a "new erection."³⁵ A lien will not lie if the building has lost its identity.³⁶ However, a new wing added to a building has been held to be an "erection,"³⁷ as well as a kitchen,³⁸ and a boiler battery on a stone foundation.³⁹ An oil tank is not a "building."⁴⁰ Where the frame of an old building is neither raised nor enlarged, but merely new machinery put in, it is not a "new structure."⁴¹ In order for repair work to be included it must be repair upon some part of the realty, not on personal property.⁴² Putting in folding doors has been held an "alteration" and not a "repair."⁴³ Raising a house is "re-

²⁹ *Hill v. La Crosse & M. R. Co.*, 11 Wis. 223.

³⁰ *H. F. Cady Lumber Co. v. Greater America Exposition Co.* (Neb.), 93 N. W. 961.

³¹ *New Jersey*.—*Combs v. Lippincott*, 35, 6 Vroom (N. J. L.) 481.

Pennsylvania.—*In re Burling's Estate*, 1 Ashm. (Pa.) 377; *Perigo v. Van Horn*, 2 Miles (Pa.) 359; *In re Hill's Estate*, 2 Clark (Pa.) 96, 3 Pa. Law J. 323.

Driesbach v. Keller, 2 Pa. St. 77; *Armstrong v. Ware*, 20 Pa. St. 519; *Grable v. Helman*, 5 Pa. Super Ct. 324, 28 Pittsb. Leg. J. (N. S.) 40, 40 W. N. C. 466.

³² *Miller v. Oliver*, 8 Watts (Pa.) 514; *In re Burling's Estate*, 1 Ashm. (Pa.) 377.

³³ *Rand v. Mann*, 3 Phila. (Pa.) 429.

³⁴ *Patterson v. Frazier*, 123 Pa. 414; 16 Atl. 477, 23 W. N. C. 143.

³⁵ *Summerville v. Wann*, 37 Pa. (1 Wright) 182.

³⁶ *In re Sabbaton's Estates*, 2 Am. Law J. (Pa.) 83.

³⁷ *Harman v. Cummings*, 43 Pa. (7 Wright) 322.

³⁸ *Hershey v. Shenk*, 58 Pa. (8 P. F. Smith) 382; *Miller v. Hershey*, 59 Pa. (P. F. Smith) 64.

³⁹ *Wheeler v. Pierce*, 167 Pa. 416; 31 Atl. 649, 46 Am. St. 679.

⁴⁰ *Selders & Co. International Boiler Works v. Lewis & Bros. Co.*, 21 Pa. C. C. R. 80, 7 Pa. Dist. R. 278.

⁴¹ *Summerville v. Wann*, 37 Pa. St. 182.

⁴² *Curnew v. Lee*, 143 Mass. 105, 8 N. E. 890; see Dec. Dig. Improvement, etc., § 26.

⁴³ *Whitenack v. Noe*, 11 N. J.

pairing" it.⁴⁴ Putting an additional story on a building is an "alteration,"⁴⁵ so is attaching wainscoting.⁴⁶ The term "improvement" will include papering and decorating a house,⁴⁷ painting and glazing,⁴⁸ putting up a lightning rod,⁴⁹ and putting in tanks and sheet-iron floors.⁵⁰ The term also covers the

Eq. 413; *Hershey v. Shenk*, 58 Pa. St. 382; *Patterson v. Frazier*, 123 Pa. 414, 16 Atl. 477, 23 W. N. C. 143.

What constitutes repair.—Where the interior of a building was torn out by the tenant, and materially changed and the front altered to some extent, but the tenant continued to occupy the building throughout the work, it constituted repairs of an old building, and entitled the contractor therefor to a lien. *De Wald v. Woog*, 158 Pa. 497, 27 Atl. 1088. The Mississippi Act of 1838 did not give a lien. *Kirk v. Taliaferro*, 16 Miss. (8 Sm. & M.) 754; *Warren v. Freeman*, 187 Pa. St. 455, 41 Atl. 290, 43 W. N. C. 131; *Whitenack v. Noe*, 11 N. J. Eq. (3 Stockt.) 413.

⁴⁴ *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

Sufficient evidence of erection.

—Where the right to a mechanic's lien for the "erection" of a house was disputed on the ground that the work in question was done in "the alteration and repair of an old house," evidence that the roof and three sides of the building were removed, and an addition erected on one side, a kitchen in the rear, and a porch in the front, with new roof, new partitions, and new ceiling joints, supported a finding that such work was performed, in "the erection

of a dwelling house." *Ward v. Crane*, 118 Cal. 676, 50 Pac. 839.

What is alteration.—Where the main design of a building remains unchanged, and the lines of its foundation walls are in no respect altered, and the interior, except for certain bay windows, is left untouched, the court, in proceedings for mechanic's lien, will not construe the building to be a new building, though the external appearance has been changed by an alteration in the roof and by repainting. *Goeringer v. Schappert*, 17 Pa. Super. Ct. 283.

⁴⁵ *Udike v. Skillman*, 27, 3 Dutch (N. J. L.) 131; *Chester City Presbyterian Church v. Conlin*, 19 Pa. Super. Ct. 515; *Smyers v. Beam*, 158 Pa. 57, 27 Atl. 884.

⁴⁶ *Matthiesen v. Arata*, 32 Ore. 342, 50 Pac. 1015.

⁴⁷ *La Grille v. Mallard*, 90 Cal. 373, 27 Pac. 294; *Freeman v. Gilpin*, 7 Leg. Int. (Pa.) 11.

⁴⁸ *France v. Woolston*, 4 Houst. (Del.) 557.

⁴⁹ *France v. Woolston*, 4 Houst. (Del.) 557. But in another state, it was held not within the law. *Drew v. Mason*, 81 Ill. 498, 25 Am. Rep. 288. And in another case it was held a question for the jury. *Barber v. Roth*, 11 York Leg. Rec. (Pa. Com. Pl.) 11.

⁵⁰ *O'Brien v. Hanson*, 9 Mo. App. 545.

furnishing of lumber for the purpose of building an office, putting in floors, etc.⁵¹ But the term "improvement" will not cover personalty that can be removed,⁵² nor upholstering,⁵³ nor scenery in an opera house.⁵⁴ When a lien is given for making an "improvement" and such lien has priority over a mortgage, the term "improvement" means an "independent structure."⁵⁵

§ 13. Character of "building," "repair," etc., giving a lien (continued).—Moving a building is neither an "erection,"¹ nor a "repair."² Improvement includes repairs under statute. A tearing down is not an "improvement."³ But moving a building has been included in the terms "alteration and repair."⁴ Tools used in moving or "repairing and

⁵¹ National Life Insurance Co. v. Ayres, 111 Iowa, 201, 82 N. W. 607.

⁵² Koenig v. Mueller, 39 Mo. 165; Mosher v. Lewis (Com. Pl) 31 N. Y. Supp. 433, 10 Misc. (N. Y.) 373.

⁵³ McCarty v. Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

⁵⁴ Harris v. Schultz, 64 Iowa, 539, 21 N. W. 22. A scenic artist is not a mechanic, laborer, or other person who performs labor. Query—Is movable scenery, etc., of a theater part of a freehold? Garring v. Hunt, 27 Ont. 149.

⁵⁵ Getchell v. Allen, 34 Iowa 559.

¹ Trask v. Searle, 21 Mass. 229; Eichleay v. Wilson, 29 Pittsb. Leg. J. (N. S.) 50. See Dec. Dig. tit Mechanics' Liens, § 27.

² Stephens v. Holmes, 64 Ill. 336; Eichleay v. Wilson, 29 Pittsb. Leg. J. (N. S.) 50 (Pa. Super. Ct.); Improvement includes repairs

under statute; Aetna Elevator Co. v. Deeves, 56 Misc. (N. Y.) 563, 107 N. Y. Supp. 63, rehearing denied, 108 N. Y. Supp. 57 Misc. (N. Y.) 632, 718, and judgment affirmed, 110 N. Y. Supp. 124.

³ Holzhour v. Meer, 59 Mo. 434.

As an Improvement.—The second story and porch of a building were torn away in order that the building might be remodeled or repaired to suit the purposes of the owner. Held, that although there could be no lien, under the mechanics' lien law, simply for tearing away a structure from land, a lien for the improvement might include the charges for such removal, as a necessary part of the improvement. Bruns v. Braun, 35 Mo. App. 337. Putting on gutters is within law. Isler v. Dixon, 140 N. Car. 529, 53 S. E. 348.

⁴ Allen v. Elwert, 29 Ore. 428, 44 Pac. 823; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775.

building" cannot, especially in the absence of statute,⁵ be made subject to a lien,⁶ but old material used in a new building may be subject to a lien.⁷ A lien is not given for such services as taking down fixtures,⁸ or removing portable engines.⁹ Excavations and foundations are generally included in the term "building."¹⁰ And this has been held to be true even though no building thereon was ever erected.¹¹ Digging a well does not come within the ordinary terms of "building or structure," and in order to be included, the statute must expressly so provide.¹² In one case, however, it was held to be included within the term "structure,"¹³ and in another the well was held to be an appurtenance where it was intended to supply water to the main building.¹⁴ It has been held to

⁵ *Burke v. Brown*, 10 Tex. Civ. App. 298, 30 S. W. 936.

⁶ *Allen v. Elwert*, 29 Ore., 428, 44 Pac. 823.

⁷ *Whitford v. Newall*, 2 Allen (84 Mass.) 424.

⁸ They are mere personal property. *A. F. Engelhardt Co. v. Benjamin*, 5 App. Div. (N. Y.) 475, 39 N. Y. Supp. 31.

⁹ *Truxall v. Williams*, 15 Lea (83 Tenn.) 427.

¹⁰ *Scott v. Goldinhorst*, 123 Ind. 268, 24 N. E. 333; *McCristal v. Cochran*, 147 Pa. 225, 23 Atl. 444, 29 W. N. C. (Pa.) 340; *Florin v. McIntire* (Com. Pl.), 14 Pa. Co. Ct. 127; *Thompson v. Porter* (Com. Pl.), 14 Pa. Co. Ct. 232. See Dec. Dig. tit. Mechanics' Liens, § 28.

¹¹ *Baker v. Waldron*, 92 Me. 17, 42 Atl. 225; *Sommerville v. Walker*, 168 Mass. 388. The right to a lien does not depend upon the size or shape of the excavation, but upon the purpose for which it is made. If it was made in

digging a cellar under a building, opening or constructing a mine, or other similar purpose, these might well be considered acts done in making improvements upon the land, for which the party performing the labor would have a lien. The same would be true of the labor performed in "stripping" a mine preparatory to getting out the ore, which was the case in *Kinney v. Duluth Ore. Co.*, 58 Minn. 455, 60 N. W. 23; *Colvin v. Weimer*, 64 Minn. 39.

¹² *Guise v. Oliver*, 51 Ark. 356, 11 S. W. 515; *Colvin v. Weimer*, 64 Minn. 37, 65 N. W. 1079.

¹³ *Haskell v. Gallagher*, 20 Ind. App. 224, 50 N. E. 485.

¹⁴ *Phelps & Bigelow Windmill Co. v. Shay*, 32 Neb. 19, 48 N. W. 896.

Tubular well.—Under Comp. St. c. 54, § 1, giving a mechanic's lien to persons who "perform labor or furnish any materials or machinery or fixtures for the erection of any building or ap-

be an "improvement."¹⁵ Generally the statutes do not cover such work as filling, grading or sodding about buildings already erected,¹⁶ unless it is included in the contract for the erection of the building.¹⁷ But the New York courts have held that there may be a lien for grading where the statute gives a lien for altering or repairing a "building," or "building lot,"¹⁸ even where there is no building on the lot.¹⁹ In the absence of statute there is no lien for the breaking of land for the purposes of cultivation.²⁰ A lien cannot be had on one building for work done on another building unless the one be appurtenant to the other, and all used as one common plant, and so connected as to in fact constitute but one building.²¹

purtenance," an account for labor performed and material furnished in sinking a tubular well cannot be the foundation for a claim for a mechanic's lien. *Omaha Consol. Vinegar Co. v. Burns*, 49 Neb. 229, 68 N. W. 492.

¹⁵ *Bates v. Harte*, 124 Ala. 427, 26 So. 898; *Hoppes v. Bale*, 105 Iowa 648, 75 N. W. 495; *National Home Building & Loan Assn. v. McAllister*, 64 Ill. App. 143.

Improvement.—The statute recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by buildings, but, as they may occur in unforeseen variety, the scope of the term "improvement" is left for determination in particular cases as they may arise. It is well known that a supply of water is often one of the most convenient and useful of all appurtenances to land. Its development by means of drilling and casing a well may greatly enhance the permanent value of the land. We therefore hold that

a well designed and made for a permanent supply of water is an improvement upon land, within the meaning of the statute referred to. *Bates v. Harte*, 124 Ala. 427, 26 So. 898.

¹⁶ *Pratt v. Duncan*, 36 Minn. 545, 32 N. W. 709, 1 Am. St. 697; *Williams, Belser & Co. v. Rowell*, 145 Cal. 259, 78 Pac. 725; *Missouri Val. Cut Stone Works v. Brown*, 50 Mo. App. 407; *Willamette Falls Transp. & Mill Co. v. Remick*, 1 Ore. 169; *Account of Ermentrout*, 1 Woodw. Dec. (Pa.), 158.

¹⁷ *Henry v. Plitt*, 84 Mo. 237.

¹⁸ *Raven v. Smith*, 71 Hun (N. Y.) 197, 24 N. Y. Supp. 601; *Pickett v. Gollner (City Ct. Brook.)*, 7 N. Y. Supp. 196.

¹⁹ *Fredericks v. Goodman St. Homestead Assn.*, 75 Hun 612, 29 N. Y. Supp. 1041.

²⁰ *Brown v. Wyman*, 56 Iowa 452, 9 N. W. 344, 41 Am. Rep. 117; *Stichtenoth v. Rife*, 6 Ohio Cir. Ct. 540.

²¹ *Killingsworth v. Allen*, 1 Phila. (Pa.) 220, 8 Leg. Int. 126;

§ 14. **Character of "building"—Fixtures.**—There is no mechanic's lien on personal property unless such personal property becomes fixed to the real estate or otherwise loses its identity and becomes a part of the real estate. It is not always easy to determine when personal property becomes a fixture. Generally it may be said that personalty becomes a fixture when it is physically annexed to realty, and is adapted to the use or purpose to which the realty is devoted, and the person making the annexation intends to make the personalty a permanent accession to the land.²² The term "fixtures" has been held to include stage fixtures and scenery;²³ chairs of a pattern made for a theater;²⁴ store shelves placed so as to conform to the building, and nailed to the wall;²⁵ a flume constructed of wood and used to lead water to a mill;²⁶ wires and insulators in an electric lighting plant;²⁷ wires for light-

McDonald v. Minneapolis Lumber Co., 28 Minn. 262, 9 N. W. 765.

²² Rinzel v. Stumpf, 116 Wis. 290; Nicholstone City Co. v. Smalley, 21 Tex. Civ. App. 210, 51 S. W. 527; Goodin v. Elleardsville Hall Assn., 5 Mo. App. 289.

Between owner and furnisher.—"It has consequently been held as between the owner and mechanic, that everything put into and forming a part of a building, or machinery for manufacturing, is a part of the freehold, and a fixture—as, the wheels of a mill, the stones, and even the bolting-cloth, the copper kettle of a brew house, and the like. Wademan v. Thorp, 5 Watts (Pa.) 115; McCreary v. Osborne, 9 Cal. 119." Grewar v. Alloway, 3 Tenn. 586.

Wheels and Boxes.—Wheels and boxes designed and built expressly for use in dry kiln, and without which the dry kiln cannot be used without altering its struc-

ture, though running on a tramway, and not actually fastened thereto, are constructively attached to, and a part of, the building, within the lien law. Meek v. Parker, 63 Ark. 367, 38 S. W. 900.

²³ Sosman v. Conlon, 57 Mo. App. 25; Halley v. Alloway, 78 Tenn. (10 Lea) 523; Grewar v. Alloway, 3 Tenn. Ch. 584. See Dec. Dig. tit Mechanics' Liens, § 28.

²⁴ Grosz v. Jackson, 6 Daly (N. Y.) 463.

²⁵ Rinzel v. Stumpf, 116 Wis. 287, 93 N. W. 36.

²⁶ Derrickson v. Edwards, 29 N. J. L. 468, 80 Am. Dec. 220.

²⁷ Hughes v. Lambertville Electric Light, Heat & Power Co., 53 N. J. Eq. (8 Dick.) 435, 32 Atl. 69; The Badger Lumber Co. v. The Warren Water Supply Co., 48 Kan. 182.

ing building;^{27*} mirrors set in a wall;²⁸ but not where held in removable frames.²⁹ A tank holding 250 barrels, upon a foundation expressly built for it, is subject to a lien.³⁰ What are known as trade fixtures are personal property and not subject to a lien.³¹ A stove pipe flue,³² removable partitions placed in a hotel by a lessee, for convenience,³³ tables in a store building,³⁴ and temporary alterations made by a tenant are not subject to a lien.³⁵ Hose and hose racks for fire protection may also be.^{35a} Whether or not appurtenances for heating, cooking, lighting and water supply are subject to a lien depends upon the question whether they are so attached as to become part of the buildings; if they are, the lien will attach.³⁶ A cooking range if permanently attached will be subject to a lien,³⁷ but not if it is movable,³⁸ and the same rule will be applied to furnaces.³⁹ But a small portable

^{27*} *Rowen v. Alladio* (Ore.), 93 Pac. 929.

²⁸ *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *McKeage v. Hanover Ins. Co.*, 81 N. Y. 38.

²⁹ *Vogel v. Farrand*, 26 Misc. (N. Y.) 130, 55 N. Y. Supp. 977.

³⁰ *Parker Land & Improvement Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848.

³¹ *Carroll v. Shooting the Chutes Co.*, 85 Mo. App. 563; *O'Brien Boiler Works Co. v. Haydock*, 59 Mo. App. 653.

³² *Missoula Mercantile Co. v. O'Donnal*, 24 Mont. 65, 60 Pac. 594.

³³ *Hanson v. News Publishing Co.*, 97 Me. 99, 53 Atl. 990.

³⁴ *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36; *Meek v. Parker*, 63 Ark. 367, 38 S. W. 900.

³⁵ *Hanson v. News Publishing Co.*, 97 Me. 99, 53 Atl. 990.

^{35a} *Crane Co. v. Epworth Hotel Construction & Real Estate Co.*, 121 Mo. App. 209, 98 S. W. 795.

³⁶ *Lambard v. Pike*, 33 Me. 141; *Michael v. Reeves*, 14 Colo. App. 460, 60 Pac. 577; *Union Stove Works v. Klingham*, 164 N. Y. 589, 58 N. E. 1093; *Dimmick v. E. H. Cook Co.*, 115 Pa. 573, 8 Atl. 627. See Dec. Dig. tit *Mechanics' Lien*, § 31.

³⁷ *Schaper v. Bibb*, 71 Md. 145, 17 Atl. 935.

³⁸ *Boston Furnace Co. v. Dimmock*, 158 Mass. 552, 33 N. E. 647; *Michael v. Reeves*, 14 Colo. App. 460, 60 Pac. 577; *Williams v. Bower* (Com. Pl.), 11 Pa. Co. Ct. (Pa.), 151. Portable heater. *Elston v. Jury* (Com. Pl.), 3 Lack. Jur. (Pa.), 107.

³⁹ *Goodin v. Elleardsville Hall Assn.*, 5 Mo. App. 289; *Schwartz v. Allen* (Super. Buff.) 7 N. Y.

laundry stove,⁴⁰ even though in the original contract, will not be.⁴¹ So a stove with its funnel,⁴² and a furnace not fastened down,⁴³ and gas fixtures, as distinguished from gas fittings, are not subject to a lien.⁴⁴ However, gas machines,⁴⁵ steam heating apparatus⁴⁶ and electric lighting plants put in houses for the purpose of furnishing light, become part of the real estate and are subject to a lien.⁴⁷ As a general rule machinery not connected with, and forming a part of the building is not subject to the lien,⁴⁸ unless attached to the realty,⁴⁹ in which event it may attach to a leasehold interest.⁵⁰ A bolting cloth in a flouring mill,⁵¹ cloth printing machines,⁵² brewery appliances,⁵³ an engine with a steam sawmill,⁵⁴ burr

Supp. 5; United States Nat. Bank v. Bonacum, 33 Neb. 820, 51 N. W. 233.

⁴⁰ Women's Homeopathic Assn. v. Harrison, 120 Pa. 28, 13 Atl. 501.

⁴¹ Harrison v. Women's Homeopathic Hospital Assn., 134 Pa. 558, 19 Atl. 804, 19 Am. St. 714, 26 W. N. C. (Pa.) 84.

⁴² Lambard v. Pike, 33 Me. 141.

⁴³ Baldwin v. Merrick, 1 Mo. App. 281.

⁴⁴ Jarecki v. Philharmonic Soc., 79 Pa. (29 P. F. Smith) 403, 21 Am. Rep. 78.

⁴⁵ Light Co. v. Gill (Com. Pl.), 14 Pa. Co. Ct. (Pa.) 6.

⁴⁶ Stebbins v. Culbreth, 86 Md. 656, 39 Atl. 321.

⁴⁷ Scannevin & Potter v. Consolidated Mineral Water Co., 25 R. I. 318, 55 Atl. 754; Southern Elec. Sup. Co. v. Rolla, 75 Mo. App. 622; Hughes v. Lambartville Elec. L., 53 N. J. Eq. 435; Forbes v. Willamette Falls Co., 19 Ore. 61.

⁴⁸ Beers v. Knapp, 5 Ben. (U. S.) 104, Fed. Cas. No. 1,232; Has-kin Wood-Vulcanizing Co. v. Cleveland Shipbuilding Co., 94 Va. 439, 26 S. E. 878; Hughes v. Heat Co., 53 N. J. Eq. 435; Griggs v. Stone, 51 N. J. L. 552.

⁴⁹ Donahue v. Cromartie, 21 Cal. 80; Schofield v. Stout, 59 Ga. 537; Baker v. Fessenden, 71 Me. 292; Pond Machine Tool Co. v. Robinson, 38 Minn. 272, 37 N. W. 99; Graves v. Pierce, 53 Mo. 423; Richardson v. Koch, 81 Mo. 264; Campbell v. John Taylor Mfg. Co., 62 N. J. Eq. (17 Dick.) 307, 49 Atl. 1119; Campbell v. John W. Taylor Mfg. Co., 51 Atl. 723, 62 N. J. Eq. 307.

⁵⁰ Dobschuetz v. Holliday, 82 Ill. 371.

⁵¹ Heldegger v. Atlantic Milling Co., 16 Mo. App. 327.

⁵² Griggs v. Stone, 51 N. J. L. 549, 18 Atl. 1094, 7 L. R. A. 48.

⁵³ Watts-Campbell Co. v. Yuen-gling, 125 N. Y. 1, 25 N. E. 1060.

⁵⁴ Morgan v. Arthurs, 3 Watts (Pa.) 140.

millstones,⁵⁵ engine and boilers for an iron furnace,⁵⁶ matte pots, fire hearths, and ore cars in a smelting furnace,⁵⁷ an ice machine and engine in a packing plant, are subject to a lien.⁵⁸ But there would be no lien for selling merely detached parts of such machinery.⁵⁹

§ 15. Character of "building"—Appurtenances.—Ordinarily there can be no lien for work or materials furnished on improvements outside of the building, unless they are appurte-

⁵⁵ *Wademan v. Thorp*, 5 Watts (Pa.) 115.

⁵⁶ *Appeal of Parish*, 83 Pa. 111.

⁵⁷ *Cary Hardware Co. v. McCarty*, 10 Col. App. 200, 50 Pac. 744.

⁵⁸ *Nason Ice-Mach. Co. v. Up-ham*, 50 N. Y. Supp. 197, 26 App. Div. 420; *Hooven, Owens & Rent-schler Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229 (U. S. C. C. A. Mo. 1901).

⁵⁹ *Loudon v. Coleman*, 59 Ga., 653.

In different buildings.—The fact that the several parts of machinery were separated, except for the roof which covered them, will not affect the right of one furnishing such machinery to a lien, where, from the nature of the plant, it was necessarily made up of parts. *Progress Press-Brick & Machine Co. v. Grattiot Brick & Quarry Co.*, 151 Mo. 501, 52 S. W. 401.

Fixed machinery.—Under the mechanics' lien act, granting a lien for the price of fixed machinery, a lien does not attach for the purchase price of complete machines, which are stayed in their places merely to make them steady, and not for the purpose of incorporating them into, and

making them part of, the realty. *Campbell v. John W. Taylor Mfg. Co.*, 64 N. J. Eq. 344, 54 Atl. 1123.

Kind included.—Everything necessary to put in motion a manufactory, and apply its power to the different machines used, is machinery, appurtenances, or fixtures, within Rev. St. 3184, giving persons who perform labor or furnish machinery for erecting a manufactory, appurtenance or fixtures, under contract with the owner, a lien thereon, and on the interest of the owner in the land on which the same may stand. *Gashe v. Ohio Lumber & Mfg. Co.* (Ohio Prob. Ct.), 31 W. L. Bull. 189, 5 Ohio S. & C. P. Dec. 130.

Where common law lien.—The purpose of Revision, p. 669, is to afford mechanics a lien on machinery, of which they could have such possession as would give them a lien by the common law; hence, where machinery is of such a character that the common-law lien may be had upon it, doubts should be so resolved as to hold it also liable to the statutory lien. *Griggs v. Stone*, 51, 22 Vroom (N. J. L.) 549, 18 Atl. 1094, 7 L. R. A. 48. See also *Griffin*

nant to the building,⁶⁰ or included in the contract for the building.⁶¹ If not appurtenant,⁶² or not within the contract for

v. Ernst, 124 App. Div. (N. Y.) 239, 108 N. Y. Supp. 816.

⁶⁰ Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327, 'a well; Beatty v. Parker, 141 Mass. 523, 6 N. E. 754, a pipe connecting a house with a sewer; Brush Electric Co. v. Warwick Electric Manuf'g Co., 6 Ohio Dec. 459, 4 Ohio (N. P.) 279, a reservoir to store water for use of a factory; Willamette Falls Trans. & Mill Co. v. Remick, 1 Ore. 169, a dam for a mill; Steger v. Arctic Refrigerating Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580, pipes in a cold storage plant to convey vapor to customers; Badger Lumber Co. v. Marion Water Supply & Power Co., 48 Kan. 182, 29 Pac. 476, 30 Am. St. 301, 15 L. R. A. 652, electric light; O'Neil v. Taylor, 59 W. Va. 376, 53 S. E. 471, coal house. See Dec. Dig. tit. Mechanics' Liens, § 33.

⁶¹ Henry v. Plitt, 84 Mo. 237, a fence; Account of Ermentrout, 1 Woodw. Dec. (Pa.) 158; Missouri Val. Cut Stone Works v. Brown, 50 Mo. App. 407, retaining wall. Hose and hose racks allowed although not in same contract. Crane Co. v. Epworth Hotel Construction & Real Estate Co., 121 Mo. App. 209, 98 S. W. 795.

⁶² Eastern Arkansas Hedge-Fence Co. v. Tanner, 67 Ark. 156, 53 S. W. 886; Parmelee v. Hambleton, 19 Ill. 615, a vault under a sidewalk; Canisius v. Merrill, 65 Ill. 67, fencing; Truesdell v.

Gay, 79 Mass. (13 Gray) 311, a retaining wall.

Power house.—A mechanics' lien cannot be filed against a hotel building for the furnishings of a power house, located 1,700 feet away, on an entirely separate lot, and which was built, not as a part of the hotel plant alone, but with a view to furnishing water, heat, light and power to individuals as well. Worthington v. Cambridge Springs Co., 24 Pa. Co. Ct. (Pa.) 281, 31 Pittsb. Leg. J. (N. S.) 277. A gas producer 289 feet distant. Cowan v. Pennsylvania Plate-Glass Co., 184 Pa. St. 16, 38 Atl. 1081.

Planting flowers.—In Shannon's Code, 3531, providing that "there shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built or repaired, or fixtures or machinery furnished or erected, or improvements made, in favor of the mechanic or undertaker, and in favor of all persons who do any portion of the work or furnish any portion of the material, for the building contemplated in this section, the term "Improvements made" refers only to buildings or other structures and the statute does not give a lien for furnishing and planting flowers, trees and shrubbery, or grading and graveling of walks. Nanz v. Cumberland Gap Park Co., 103 Tenn. 299, 52 S. W. 999, 47 L. R. A. 273.

building, there is no lien.⁶³ The weight of authority is that there can be no mechanic's lien for grading, curbing or paving a street in front of a house,⁶⁴ or for building a sidewalk,⁶⁵ unless it is all done under a contract for erecting the building.⁶⁶ Some few courts have included such work as being an appurtenant to the building, and made the building liable for the lien.⁶⁷ And one court has held that it might even include a sewer,⁶⁸ or drain pipe.⁶⁹

§ 16. **Kind of services giving a lien.**—The statute very often specifies what particular kind of labor will be included. Generally, however, the lien is given to any person who performs labor,¹ and the word "labor" is not given a narrow or strained construction.² As a matter of course the "labor" must come

⁶³ Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327.

⁶⁴ Smith v. Kennedy, 89 Ill. 485; Clymer Paving Co. v. Donegan (Com. Pl.), 4 Pa. Dist. 243. See Dec. Dig. tit. Mechanics' Liens, § 34.

⁶⁵ Fleming v. Prudential Ins. Co. (Colo.), 73 Pac. 752. In this last case it is so held because the walk is not on the land of the owner of the building. Seeman v. Schultze, 100 Ga. 603, 28 S. E. 378. In this case it was considered rather a public than a private benefit.

Iowa.—Coenen v. Straub, 74 Iowa 32, 36 N. W. 877, 7 Am. Rep. 470.

Indiana.—Knaube v. Kerchner, 39 Ind. 217.

Missouri.—Dugan Cut-Stone Co. v. Gray, 43 Mo. App. 671.

Pennsylvania.—W. T. Bradley Co. v. Gaghan, 208 Pa. 511, 57 Atl. 985; Edelkamm v. Comly (Com. Pl.), 12 Pa. Co. Ct. 371.

⁶⁶ **Missouri.**—Pullis v. Hoffman, 28 Mo. App. 666; McDermott v. Class, 104 Mo. 14, 15 S. W. 995; Dugan Cut-Stone Co. v. Gray, 114 Mo. 497, 21 S. W. 854, 35 Am. St. 767.

Pennsylvania.—Yearsley v. Flanagan, 22 Pa. 489.

West Virginia.—O'Neill v. Taylor, 59 W. Va. 370, 53 S. E. 471.

⁶⁷ Dugan Cut-Stone Co. v. Gray, 114 Mo. 497, 21 S. W. 854, 35 Am. St. 767; Kenney v. Apgar, 93 N. Y. 539; McCain v. Hutton, 131 Cal. 132, 63 Pac. 182; window and door screens, E. M. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

⁶⁸ Williams, Belser & Co. v. Rowell, 145 Cal. 259, 78 Pac. 725.

⁶⁹ O'Neill v. Taylor, 59 W. Va. 370, 53 S. W. 471.

¹ Ohio Laws 1894, p. 185. See §§ 44, 45. See Dec. Dig. tit. Mechanics' Liens, § 35.

² Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 66 Fed. 683.

within the provisions of the statute before a lien can be claimed.³ Among other things charges for securing material,⁴ drawing contract for building,^{4a} and "loss of time for men, delay, risk and inconvenience to contract work,"⁵ cannot be secured by lien. As a general proposition it may be said that the labor must be a kind of labor that is included in the contract between the owner and the builder.⁶ The term "labor" is not entirely confined to manual labor. Thus the services of a superintendent whose duty it was to superintend the construction of the building were included.⁷ However, some courts hold to the contrary.⁸ And those courts that have held in favor of a lien for superintendence have limited it to superintendence directly on the building and not on something away from the building, though it might be used therein.⁹ It has

³ *Peatman v. Centerville Light etc., Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276; *Burnside v. O'Hara*, 35 Ill. App. 150; *Willamette Falls Transp., etc., Co. v. Remick*, 1 Ore. 169; *Haynes v. Holland* (Tenn. Ch. App.), 48 S. W. 400; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706, drilling and casing well; *Rolewitch v. Harrington*, 20 S. Dak. 375, 107 N. W. 207, 6 L. R. A. (N. S.) 550n.

⁴ *Edgar v. Salisbury*, 17 Mo. 271; *Price v. Merritt*, 55 Mo. App. 640.

^{4a} *Buckingham v. Flummerfelt*, 15 N. Dak. 112, 106 N. W. 403.

⁵ *Lee v. Brayton*, 18 R. I. 232, 26 Atl. 256.

⁶ *Stokes v. Green*, 10 S. Dak. 286, 73 N. W. 100.

⁷ *Colorado*.—*Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303.

Louisiana.—*Mulligan v. Mulligan*, 18 La. Ann. 20.

Minnesota.—*Waganstein v. Jones*, 61 Minn. 262, 63 N. W. 717.

New York.—*Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262n.

Oregon.—*Willamette Falls Transp., etc., Co. v. Remick*, 1 Ore. 169.

See Dec. Dig. tit *Mechanics' Liens*, § 42.

An employe of a contractor who kept the books of his employer, superintended a part of the work, and was foreman of the laborers, cannot be said, as a matter of law, to be a laborer entitled to a lien for his work, and the issue was for the jury. *Tuck v. Moss Mfg. Co.*, 127 Ga. 729, 56 S. E. 1001.

⁸ *Pitschke v. Pope*, 20 Colo. App. 328, 78 Pac. 1077; *Cook v. Ross*, 117 N. Car. 193, 23 S. E. 252; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257.

⁹ *Smallhouse v. Kentucky & Montana Gold, etc., Co.*, 2 Mont. 443.

been held that a mechanic could not claim a lien for his services in superintending workmen on his own building.¹⁰ The oversight of farm hands is not included, and the same rule is applied to the instructing of a superintendent.¹¹ As a general rule the architect who prepares the plans and specifications and superintends the construction of the work is entitled to a lien.¹² Some courts hold to the contrary unless the

¹⁰ *Blakey v. Blakey*, 27 Mo. 39.

Owner superintending his own building.—The law gives the mechanic, builder, artisan, workman, laborer, or other person, who may do or perform any work upon or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished; but it has no such elastic power as is claimed for it in this case, and it cannot be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen. *McAllister v. Dennin*, 27 Mo. 40.

¹¹ *Whitaker v. Smith*, 81 N. Car. 340, 31 Am. Rep. 503.

Instructing superintendent.—A mechanics' lien may be acquired by any mechanic or other person "who shall do any labor upon, or furnish any materials, machinery, or fixtures, for any building, erection or other improvement upon land." Under this provision a lien may be obtained for the labor of a man to operate a plant for thirty days, in order to test the machinery and cause it to meet the requirements of the guaranty; but the contractor is

not entitled to a lien for services rendered in instructing the superintendent, nor for the assignment of patent rights which were not included in the use of the appliances which the contractor was required to furnish. *Peatman v. Centerville Light, etc., Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276.

¹² *Alabama*.—*Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 38 Am. St. 105, 16 L. R. A. 600n.

Iowa.—*Foster v. Tierney*, 91 Iowa 253, 59 N. W. 56, 51 Am. St. 343.

Illinois.—*Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055.

Minnesota.—*Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Knight v. Norris*, 13 Minn. 473.

Nebraska.—*Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616.

New Jersey.—*Mutual Ben. Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389.

New Mexico.—*Johnson v. McClure*, 10 N. Mex. 506, 62 Pac. 983.

New York.—*Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262n; *Rinn v. Electric Power Co.*, 3 App. Div. (N. Y.) 305, 38 N. Y. Supp. 345.

statute so provides.^{12a} Merely making the plans if they are used is sufficient to give a lien,¹³ but otherwise if they are not used.¹⁴ Keeping books, auditing accounts and making settlements with various contractors or as supervising architect, as a general rule will not entitle the person doing the same to a lien.¹⁵ However, a person in order to get a lien does not necessarily have to be a laborer himself, but may secure it for work done by his workmen.¹⁶

§ 17. **Kind of services on building.**—It is a general rule that the "labor" must in some way go towards the building or construction against which a lien is claimed,¹⁷ or be appurtenant

Pennsylvania.—*St. Clair Coal Co. v. Martz*, 75 Pa. St. 384; *Bank v. Gries*, 35 Pa. St. 423.

Rhode Island.—*Field & Slocomb v. Consolidated Mineral Water Co.*, 25 R. I. 319, 55 Atl. 757, 105 Am. St. 895.

See Dec. Dig. tit. Mechanics' Liens, § 38.

^{12a} *Libbey v. Tidden*, 192 Mass. 175, 78 N. E. 313.

¹³ *Parsons v. Brown*, 97 Iowa 699, 66 N. W. 880; *Von Dorn v. Mengedoh*, 41 Neb. 525, 59 N. W. 800; constructed on different plan, *Buckingham v. Flummerfelt*, 15 N. Dak. 112, 106 N. W. 403.

¹⁴ *Foster v. Tierney*, 91 Iowa 253, 59 N. W. 56, 51 Am. St. 343; *Price v. Kirk*, 90 Pa. St. 47, 13 Phila. (Pa.) 497; *Libbey v. Tidden*, 192 Mass. 175, 78 N. E. 313.

¹⁵ **Illinois.**—*Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 18 N. E. 809.

Kentucky.—*Foushee v. Grigsby*, 75 Ky. (12 Bush) 75.

Missouri.—*Raeder v. Bensberg*, 6 Mo. App. 445.

Pennsylvania.—*Bank v. Gries*, 35 Pa. St. 423.

Tennessee.—*Thompson v. Baxter*, 92 Tenn. 305, 21 S. W. 668, 36 Am. St. 85.

These cases hold that the architect has no lien, the latter because an architect is not a "mechanic," "undertaker," or "furnisher" within the statute.

California.—*McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182.

Illinois.—*Salem v. Lane & Bodley Co.*, 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481.

¹⁶ **Massachusetts.**—*Parker v. Bell*, 73 Mass. (7 Gray) 429; *Wera v. Bowerman*, 191 Mass. 458, 78 N. E. 102.

Rhode Island.—*Hatch v. Faucher*, 15 R. I. 459, 8 Atl. 543.

¹⁷ *Webster v. Real Estate Imp. Co.*, 140 Mass. 526, 6 N. E. 71.

See Dec. Dig. tit. Mechanics' Liens, § 39.

to the building.¹⁸ It is not absolutely necessary that the labor be performed on the premises; it is sufficient if the result of the labor goes into the building or structure or is intended for that purpose.¹⁹ There can be no lien for services in cooking for or lodging men employed on the building.²⁰ In one case, however, where it was included in the building contract, it was allowed.²¹ As a general proposition transporting materials to the building has been held to be labor for which a lien may be

¹⁸ *Grading a lot*.—*Reid v. Berry*, 178 Mass. 260, 59 N. E. 760.

¹⁹ *Wilson v. Sleeper*, 131 Mass. 177; *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628; *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013; *Howes v. Reliance Wire Works Co.*, 46 Minn. 44, 48 N. W. 448.

Done on Land.—The words "work done on land" are somewhat indefinite in their character, and it might be a matter of some difficulty to determine accurately all the kinds of labor for which a lien can be obtained. But without attempting to decide whether they have any further extent, we think they were certainly designed to include all labor done directly upon the land for the purpose of preparing it for use as such. And fencing would seem to fall within this class. It is done upon the land, the fence becomes appurtenant to the land, and its object is to enable the land to be used or occupied as such.

Bailey v. Hull, 11 Wis. 289 [302].

See Dec. Dig. tit. Mechanics' Liens, § 43.

Furnishing Under Contract.

The statute must have a reasonable and practical construction. Otherwise great injustice might frequently result. In these days a large portion of the material furnished for the construction of buildings, such as cut stone, inside finishing, etc., is prepared at the yard or shop of the contractor or manufacturer, in accordance with plans and specifications for particular buildings, with the implied consent of the owner, and which in many cases would be of comparatively little value for use elsewhere. Such work of preparation should be deemed a part of the construction or "furnishing" under the contract. *Howes v. Reliance Wire-Works Co.*, 46 Minn. 44, 48 N. W. 448; *Berger v. Turnblad*, 98 Minn. 163, 107 N. W. 543, 116 Am. St. 353; *Parrish and Hazard's Appeal*, 83 Pa. St. 111; *Sweet v. James*, 2 R. I. 270.

²⁰ *McCormick v. Los Angeles City Water Co.*, 40 Cal. 185.

²¹ *Lybrandt v. Eberly*, 36 Pa. St. 347.

See Dec. Dig. tit. Mechanics' Lien, § 47.

had.²² It must be shown, however, that the materials were furnished for, or used in the building.²³

§ 18. **Kind of material giving a lien.**—No particular rule can be given as to the kind of material for which a lien may be had otherwise than to state that it generally will include all kinds of material that may be used in the building or structure for which a lien is given by law and which is included within the express or implied terms of the building contract.¹ Even if not included within the express or implied terms of the building contract, a sub-contractor may have his lien if the materials are of the proper kind to be used in the building, and if he believed they were for that purpose.² It does not matter whether the materials are in the rough,³ or in large or small quantities, or from whom purchased, or whether they are kept by the contractor as ordinary merchandise.⁴ Sod used in a public park is proper in that kind of an improve-

²² **Colorado.**—Tabor v. Armstrong, 9 Colo. 285, 12 Pac. 157.

Kentucky.—Fowler & Guy v. Pompelly, 25 Ky. L. 615, 76 S. W. 173.

Minnesota.—McKeen v. Hazel-tine, 46 Minn. 426, 49 N. W. 195.

Pennsylvania.—Tizzard v. Hughes, 3 Phila. (Pa.) 261; Hill v. Newman, 38 Pa. St. 151, 80 Am. Dec. 473; Holman v. Redemptorist Fathers, 4 Pa. Co. Ct. 233.

South Dakota.—Kehoe v. Hansen, 8 S. Dak. 198, 65 N. W. 1075, 59 Am. St. 759; also 2 S. Dak. 200.

In Massachusetts, which seems to stand alone, it was held, that the carting of lumber and sand did not give a lien. Webster v. Real Estate Imp. Co., 140 Mass. 526, 6 N. E. 71.

²³ Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008.

¹ Hazard Powder Co. v. Byrnes, 12 Abb. Pr. (N. Y.) 469, 21 How. Pr. (N. Y.) 189.

See Dec. Dig. tit. Mechanics' Liens, § 45.

² Odd Fellows' Hall v. Masser, 24 Pa. St. 507, 64 Am. Dec. 675n.

³ Busfield v. Wheeler, 96 Mass. (14 Allen) 139; Grand Island Banking Co. v. Koehler, 57 Neb. 649, 78 N. W. 265.

⁴ Sweet v. James, 2 R. I. 270; Progress Press-Brick & Mach. Co. v. Gratiot Brick & Quarry Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. 557; Weatherly v. Van Wyck, 128 Cal. 329, 60 Pac. 846; Reobling Sons Co. v. Bear Val. Irr. Co., 99 Cal. 488, 34 Pac. 80.

ment.⁵ So also are materials for a heating plant in a hotel,^{5a} an asbestos covering for a still and pipe,⁶ an apparatus for opening and closing windows,^{6a} and paint.⁷ But tools furnished to a contractor to be used by him on the building, or structure, are not such as will give a lien.⁸ So it has been held that the putting of a completed house on a lot of ground is not within the ordinary statute, unless the completed house was part of a larger structure.⁹ Where machinery is specified it means the completed machine and not its parts.¹⁰ As statutes of this character have no extra territorial effect the question has sometimes been raised whether material not delivered within the state is included in the law. The general rule is that this makes no difference.¹¹ In a New York case, however, it was held that if the contract was to be performed in another state, no lien could be had in that state.¹² As a general rule, materials that are used but not incorporated in the work, such as tools, etc., are not within the statute.¹³ Pat-

⁵ *Fox v. Rehsteiner*, 18 Ohio Cir. Ct. 610.

^{5a} *Siegmund v. Kellogg-Mackay-Cameron Co.*, 38 Ind. App. 95, 77 N. E. 1096.

⁶ *Angier v. Bay State Distilling Co.*, 178 Mass. 163, 59 N. E. 630.

^{6a} *McNab &c. Mfg. Co. v. Patterson Bldg. Co.* (N. J. Eq.), 63. Atl. 709.

⁷ *Van Calvert v. McKinney*, 2 Tex. Unrep. Cas. 345.

⁸ *Evans v. Lowler*, 67 N. J. Eq. 232, 58 Atl. 294.

⁹ *Seldon v. Meeks*, 17 Cal. 128; *Dorsey v. Langworthy*, 3 G. Greene (Iowa) 341.

¹⁰ *Campbell v. John W. Taylor Mfg. Co.*, 62 N. J. Eq. 307, 49 Atl. 1119.

¹¹ *Parker Land & Imp. Co. v. Reddick*, 18 Ind. App. 616, 47 N.

E. 848. Nonresidence of claimants makes no difference. *Atkins v. Little*, 17 Minn. 342; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759; *Badger Lumber Co. v. Mayes*, 38 Neb. 822, 57 N. W. 519; *Bender v. Stettinius*, 19 Wkly. L. Bull. 163, 10 Ohio Dec. (Re.) 186; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

Expressage—When allowed.—*Nancolas & Howard v. Hitafter & Prouty*, 136 Iowa 341, 112 N. W. 382, 12 L. R. A. (N. S.) 864n.

¹² *Campbell v. Coon*, 8 Misc. (N. Y.) 234, 28 N. Y. Supp. 561, 59 N. Y. St. 200.

¹³ *Basshor v. Baltimore &c. R. Co.*, 65 Md. 99, 3 Atl. 285.

See Dec. Dig. tit. Mechanics' Liens, § 47.

terns for boxes in which materials are shipped,¹⁴ lumber for scaffolding,¹⁵ lubricating oil for machinery,¹⁶ a temporary bridge to be used while another is being constructed,¹⁷ patents for manufacturing gas in gas plant,¹⁸ machinery used in construction,¹⁹ are not within the statute.²⁰

§ 19. **Kind of material used in building.**—Considerable controversy has arisen over the question whether or not materials which were prepared or furnished, but not used in the building or structure, are included in the lien laws, and the weight of authority is to the effect that only such materials as are actually used in the construction of the building can come within the provisions of the law.²¹ And this would seem to be the proper conclusion, after taking into consideration the theory of the lien law, that the land is liable because of there being value added to it. If the material was not used there would be no added value to the land. However, as between

¹⁴ *First Nat. Bank v. Perris Irrigation Dist.*, 107 Cal. 55, 40 Pac. 45.

¹⁵ *Oppenheimer v. Morrell*, 118 Pa. St. 189, 12 Atl. 307.

¹⁶ *Standard Oil Co. v. Lane*, 75 Wis. 636, 44 N. W. 644, 7 L. R. A. 191.

¹⁷ *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357.

¹⁸ *Peatman v. Centerville Light Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276.

¹⁹ *Jerecke Mfg. Co. v. Struther*, 14 Ohio Cir. Ct. 400, 8 Ohio Cir. Dec. 5.

²⁰ *Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294.

Barrels for lime.—Where lime was furnished for the construction of a building, the lien may include a charge for barrels in

which the lime was sent, but which were not returned after it was used. *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069.

²¹ *Alabama*.—*Lee v. King*, 99 Ala. 246, 13 So. 506.

Arkansas.—*Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583.

Connecticut.—*Chapin v. Persse & Co. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263n.

Illinois.—*Compound Lumber Co. v. Murphy*, 169 Ill. 343, 48 N. E. 472; *Hunter v. Blanchard*, 18 Ill. 318; 68 Am. Dec. 547.

Kansas.—*Hill v. Bowers*, 45 Kan. 592, 26 Pac. 13; *McGarry v. Averill*, 50 Kan. 362, 31 Pac. 1082, 34 Am. St. 120.

Louisiana.—*Consolidated Engineering Co. v. Town of Crowley*, 105 La. 615, 30 So. 222.

the owner and material man if it is the owner's fault that they are not used, this will not absolve the property from liability for the lien.²² Thus, if the owner goes into bankruptcy,²³ or suffers his property to go into the hands of a receiver,²⁴ or diverts the material to other use,²⁵ or otherwise appropriates it to his own use, the right to a lien will not be defeated.²⁶

§ 20. Kind of material furnished on credit of building.—In some states it has been held sufficient between owner and contractor that the material is furnished on the credit of the proposed building.²⁷ In such cases, however, the material must

Missouri.—*Simmons v. Carrier*, 60 Mo. 581; *Schulenberg v. Prairie Home Inst.*, 65 Mo. 295; *Dear-dorf v. Everhartt*, 74 Mo. 37; *Fitzpatrick v. Thomas*, 61 Mo. 512; *Current River Lumber Co. v. Cravens*, 54 Mo. App. 216.

Nebraska.—*Weir v. Barnes*, 38 Neb. 875, 57 N. W. 750.

Oregon.—*Fitch v. Howitt*, 32 Ore. 396, 52 Pac. 192.

Pennsylvania.—*Stephens v. Campbell*, 13 Pa. Super. Ct. 7.

Texas.—*Murphy v. Fleetford*, 30 Tex. Civ. App. 487, 70 S. W. 989.

Vermont.—*Hinckley &c. Iron Co. v. James*, 51 Vt. 240.

West Virginia.—*McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

²² *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479; *Salem v. Lane & Bodley Co.*, 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481; *Bell v. Mecum*, N. J. L.—, 68 Atl. 149.

²³ *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170; *Sears v.*

Wise, 52 App. Div. (N. Y.) 118, 64 N. Y. Supp. 1063.

²⁴ *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918; *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224; *Totten &c. Iron & Steel Foundry Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703.

²⁵ **Colorado.**—*Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

Illinois.—*Chicago Artesian Well Co. v. Corey*, 60 Ill. 73.

New Jersey.—*Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189.

Pennsylvania. — *Presbyterian Mursch (Com. Pl.)*, 1 Lack. Leg. N. (Pa.) 247.

Wisconsin.—*Esslinger v. Huebner*, 22 Wis. 632.

²⁶ *Beckel v. Petticrew*, 6 Ohio St. 247.

²⁷ **New Jersey.**—*Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189.

Pennsylvania. — *Presbyterian Church v. Allison*, 10 Pa. St. 413; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675n;

have been specifically contracted for.²⁸ Generally subcontractors are not deprived of their right to a lien by the fact that the contractor suspends work.^{28a} Of course if there is nothing due a contractor the subcontractor will not get anything.²⁹ However, if some materials were used and others not, there may be a question between sub-contractors as to which would be included.³⁰ The material furnished must be such as is proper and suitable within the terms of the original contract before it can be subject to the lien.³¹ Like any other matter of contract, this may be waived by the owner.³² In order, however, to defeat the lien for imperfection of the material, it must be a substantial imperfection.³³ Money does not

Gaule v. Bilyeau, 25 Pa. St. 521; *Murphy v. Ellis*, 11 Pa. Co. Ct. 301; *Linden Steel Co. v. Imperial Refining Co.*, 146 Pa. St. 4, 23 Atl. 800. See Dec. Dig. tit. *Mechanics' Liens*, § 53.

²⁸ *Daniel v. Weaver*, 73 Tenn. (5 Lea) 392; *Lee v. Hoyt*, 101 Iowa, 101, 70 N. W. 95; *Hobson Bros. v. Townsend*, 126 Iowa 453, 102 N. W. 413; *Jonte v. Gill* (Tenn. Ch. App.) 39 S. W. 750.

^{28a} *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073.

²⁹ *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

Evidence as to use.—All that the plaintiff is required to show, is the fact that the materials were furnished for the purpose of being used in constructing the building. It would be altogether unreasonable to require him to follow those materials from his lumber yard to the building, and to make positive proof of the fact that they were actually used for the purposes for which they

were alleged to have been purchased. Such a thing is not only a matter of extreme inconvenience in all cases, but in a majority of instances must be totally impracticable. In contemplation of law the owner of the building, by employing a person to do the work, does hereby clothe him with authority, not to bind him individually and to an unlimited extent, as an ordinary agent might do, but so far as the procuring of materials and labor may be necessary to complete his contract. *Morrison v. Hancock*, 40 Mo. 561.

³⁰ *Esslinger v. Heubner*, 22 Wis. 632; *Murphy v. Fleetford*, 30 Tex. Civ. App. 487, 70 S. W. 989.

³¹ *Boynton Furnace Co. v. Gilbert*, 87 Iowa 15, 53 N. W. 1085; *Harlan v. Rand*, 27 Pa. St. 511.

³² *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675n.

³³ *Bianchi v. Hughes*, 124 Cal. 24, 56 Pac. 610; *Hinkley v. Grafton Hall*, 101 Wis. 69, 76 N. W. 1093.

come within the term "labor" or "material," and consequently when advanced for the purpose of purchasing material,³⁴ or paying for labor,³⁵ will not be included, even when it is intended that the labor and material shall come within the lien law.³⁶

§ 21. **Intent with which services are rendered or materials furnished.**—The mere fact that labor and material are of the kind for which a lien may be had will not suffice in all cases to authorize a lien; the intent with which the labor or materials are furnished controls. As a general rule it may be said that in order for the lien to attach the materials must be furnished with the intent that they be used upon the building which it is sought to make subject to the lien.¹ It is clear that this element of intent was lacking in cases where the furnisher of material did not know that they were to be used in the build-

³⁴ **Louisiana.**—First Municipality v. Bell, 4 La. Ann. 121.

Missouri.—Ray County Sav. Bank v. Cramer, 54 Mo. App. 587.

New Jersey.—Evans v. Lower, 67 N. J. Eq. 232, 58 Atl. 294.

Texas.—Gaylord v. Loughridge, 50 Tex. 573; First Nat. Bank v. Campbell, 24 Tex. Civ. App. 160, 58 S. W. 628.

³⁵ **Hamilton v. Stilwaugh**, 11 Ohio C. C. 182.

³⁶ **Godeffroy v. Caldwell**, 2 Cal. 489, 56 Am. Dec. 360; **Williams v. Bradford** (N. J. Eq.), 21 Atl. 331.

A building and loan association.—International Bldg. & Loan Assn. v. Fortassian (Tex. Civ. App.), 23 S. W. 496.

If special credit is given to owner no lien will lie.—Kerby v. Daly, 45 N. Y. 84.

¹ **Kansas.**—Weaver v. Sells, 10 Kan. 609.

Massachusetts.—Bennet v. Schackford, 93 Mass. (11 Allen) 444.

Missouri.—Current River Lumber Co. v. Cravens, 54 Mo. App. 216.

Nebraska.—Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209; **White Lake Lumber Co. v. Russell**, 22 Neb. 126, 34 N. W. 104, 3 Am. St. 262.

North Carolina.—Lanier v. Bell, 81 N. Car. 337.

Tennessee.—Mills v. Terry Mfg. Co., 91 Tenn. 469, 19 S. W. 328.

Manitoba.—McArthur v. Dewar, 3 Man. R. 72; **Sprague v. Besant**, 3 Man. R. 519.

^{1a} **Knudson-Jacob Co. v. Brandt**, 44 Wash. 68, 87 Pac. 43.

ing,² or where he sold them upon a general account,³ or under a general sale without reference to where they are to be used,⁴ or what is to be done with them.⁵ Where the property is in the hands of a receiver the rights of the furnisher are to be worked out through the court appointing the receiver.⁶ As a general rule the sub-contractor must always show that the material was actually delivered at the building or used therein.⁷ Courts are more liberal in protecting the furnisher of materials that actually goes into the building than where it is not so used.⁸

§ 22. Intent on particular building.—A good many of the courts have held that it must not only be the intention of the parties furnishing the lumber that it should be used for building purposes, but that it should go into a particular building.⁹

² Two car loads of brick, purchased before contract for building made. *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918.

³ *Pogue v. Clark*, 25 Ill. 351 [308].

⁴ *Weaver v. Sells*, 10 Kan. 609; *Colorado Iron Works v. Riekenberg*, 4 Idaho 705, 43 Pac. 681; *Bennett v. Shackford*, 93 Mass. (11 Allen) 444.

⁵ *Mills v. Terry Mfg. Co.*, 91 Tenn. 469, 19 S. W. 328.

⁶ *In re Cook*, 3 Biss. (U. S.) 116, 6 Fed. Cas. No. 3,151.

⁷ *Foster v. Dohle*, 17 Neb. 631, 24 N. W. 208; *Marrender v. Paxton*, 17 Neb. 634, 24 N. W. 209.

⁸ Precise accuracy not required. *Halsted & Harmount v. Arick*, 76 Conn. 382, 56 Atl. 628. If it cannot be determined no lien will attach. *Angler v. Bay State Distilling Co.*, 178 Mass. 163, 59 N. E. 630.

Mistake of lot.—Where materials are furnished to be used in erecting a building on lot 3, but by mistake the building is erected on lot 4, and is afterwards removed to lot 2, the material man is not entitled to a lien on lot 2. *Lingren v. Nilsen*, 50 Minn. 448, 52 N. W. 915; *A. M. Stevens Lumber Co. v. Kansas City Lumber Co.*, 72 Mo. App. 248; *Scott v. Scott*, 196 Pa. St. 132, 46 Atl. 379; *Salt Lake Lithographing Co. v. Ibex Mine & Smelting Co.*, 15 Utah 440, 49 Pac. 768, 62 Am. St. 944.

⁹ *Alabama*.—*Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918.

California.—*Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54.

Connecticut.—*Chapin v. Persse &c. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263n.

Other courts, however, hold that it is sufficient if the intention was that the lumber should be used upon some building on the land without having any particular building in mind.¹⁰ There is no way of reconciling these divergent opinions, but it is thought that with the advance of the doctrine of a more liberal construction of these laws the prevailing opinion will finally be, especially between the owner and contractor, that it will be sufficient if the material was furnished for the purpose of some building without having a particular one in mind. On this theory the sub-contractor who furnishes material to a contractor who is engaged on several buildings may divide his lien, and hold each separate piece of property for the material that actually went into it.¹¹ In such cases it devolves upon the material man to show that it went into the building.¹² The

Florida.—*Manatee Light & Traction Co. v. Tampa Plumbing & Supply Co.*, 52 Fla. 533, 42 So. 703.

Indiana.—*Hill v. Sloan*, 59 Ind. 181.

Michigan.—*North v. Globe Fence Co.*, 144 Mich. 557, 108 N. W. 285, 13 Det. Leg. N. 305.

New York.—*Watrous v. Elmen-dorf*, 55 How. Prac. (N. Y.) 461.

Ohio.—*Horton v. Carlisle*, 2 Disney (Ohio) 184.

Pennsylvania.—*Hills v. Elliott*, 16 Serg. & R. (Pa.) 56.

South Carolina.—*Wardlaw v. Troy Oil Mill*, 74 S. Car. 368, 54 S. E. 658, 114 Am. St. 1004.

Washington.—*W. P. Fuller & Co. v. Ryan*, 44 Wash. 385, 87 Pac. 485.

¹⁰ **Iowa.**—*Cotes v. Shorey*, 8 Iowa 416.

Minnesota.—*Atkins v. Little*, 17 Minn. 342; *Emery v. Hertig*, 60 Minn. 54, 61 N. W. 830.

Missouri.—*Schulenberg & Lumber Co. v. Johnson*, 38 Mo. App. 404.

Nebraska.—*Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759.

New Jersey.—*Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189.

New York.—*Watrous v. Elmen-dorf*, 55 How. Pr. (N. Y.) 461.

Ohio.—*Horton v. Carlisle*, 2 Disney (Ohio) 184.

¹¹ *Davis v. Farr*, 13 Pa. St. 167; *Harper v. Keely*, 17 Pa. St. 234; *Crawford v. Powell*, 101 Ind. 421.

¹² *Lewis v. Saylor*, 73 Iowa 504, 35 N. W. 601; *Childs v. Anderson*, 128 Mass. 108; *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367.

Separate entries.—Separate entries of the items in the material man's book of original entry are sufficient to preserve the integrity of a lien account for ma-

intention necessary to hold a lien is absent where the contract is not made with the owner, unless authority of the agent is shown. Thus, when a husband purchases material for the erection of a building on his wife's land, the material man is not entitled to a lien unless he shows that the contract was made with the wife's authority.¹³ It is also required that the material be furnished upon the credit of some building,¹⁴ and not upon the individual credit of the purchaser;¹⁵ if furnished for an unknown purpose there will be no lien.¹⁶ But the mere fact that the material man where he stands in the position of the sub-contractor intends to look first to the contractor and if he fails there, then to the building, will not defeat his lien.¹⁷ Some courts hold that it is not merely neces-

terials furnished for the erection of a building, although his ledger contains an account in which such items are lumped together with others. *Kaufman-Wilkinson Lumber Co. v. Christophel*, 59 Mo. App. 80.

¹³ *Hawkins' Lumber Co. v. Brown*, 100 Ala. 217, 14 So. 110; *Little v. Vredenburg*, 16 Ill. App. (16 Bradw.) 189; *Getty v. Trammel*, 67 Iowa 288, 25 N. W. 245; *Esslinger v. Huebner*, 22 Wis. 632; *Ryman v. Wolf*, 6 Luzerne Legal Reg. Rep. (Pa.) 325.

See §§ 37-39.

¹⁴ *Whittier v. Puget Sound Loan &c. Co.*, 4 Wash. 666, 30 Pac. 1094, 31 Am. St. 944.

Equities in Houses.—A mechanic's lien cannot be sustained where it appears as a fact that the claimant did not look to the operation of the lien statute, but to the equities in the houses. *National Wall-Paper Co. (appeal of)*, 15 Pa. Super. Ct. 407; *Elsenbeis v. Wakeman*, 3 Wash. St. 534, 28

Pac. 923; *Harlan v. Rand*, 27 Pa. St. 511.

¹⁵ **Alabama.**—*Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 So. 25.

Connecticut.—*Chapin v. Persse &c. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263n.

Iowa.—*Brown v. Rodocker*, 65 Iowa 55, 21 N. W. 160.

Kansas.—*Wagner v. Darby*, 49 Kan. 343, 30 Pac. 475, 33 Am. St. 369.

Pennsylvania.—*Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675n.

Rhode Island.—*Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323.

¹⁶ *Cotes v. Shorey*, 8 Iowa, 416; *Poole v. Union Pass Ry. Co. (Pa.)*, 16 Atl. 736, 24 W. N. C. (Pa.) 376.

¹⁷ *Sodini v. Winter*, 32 Md. 130; *Ridge v. Mercantile Loan &c. Co.*, 56 Mo. App. 155; *Hommel v. Lewis*, 104 Pa. St. 465; *Presbyterian Church v. Allison*, 10 Pa. St. 413.

sary that the materials must be furnished on the credit of a building, but of a particular building.¹⁸ Where the material has been purchased and used in the construction or repair of a particular building and the claimant has complied with the law, the law indulges the presumption that the material was furnished on the credit of the building.¹⁹ It is a rebuttable presumption, however.²⁰

§ 23. Penalty for wrongful use of material—Ohio statute.—

Section 3184c of the Ohio statute provides that "Any owner, contractor or sub-contractor who shall purchase materials on credit, and represent at the time of purchase that the same

¹⁸ *Colorado*.—*Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108, 75 Pac. 150.

Delaware.—*Mulrine v. Washington Lodge No. 5, I. O. O. F.*, 6 Houst. (Del.) 350; *McCartney v. Buck*, 8 Houst. (Del.) 34, 12 Atl. 717.

Illinois.—*Wetherill v. Ohlen-dorf*, 61 Ill. 283.

Pennsylvania.—*Spring Brook Lumber Co. v. Watkins*, 26 Pa. Super. Ct. 199; *Green v. Thompson*, 172 Pa. St. 609, 33 Atl. 702.

United States.—*Grant v. Strong*, 85 U. S. (18 Wall.) 623, 21 L. Ed. 859.

¹⁹ *Eufaula Water Co. v. Addy-ston Pipe & Steel Co.*, 89 Ala. 552, 8 So. 25; *Smith-Anthony Stove Co. v. Spear*, 2 Mo. App. Rep'r. 1250, 65 Mo. App. 87.

Question for jury.—Whether the materials for which a mechanic's claim has been filed were furnished on the credit of the building or that of the contractor is a question for the jury. It is not necessary for a

material man to allege in his lien or to prove affirmatively that his materials were furnished for and entered into its construction. The burden is then on the defendant to show that they were furnished on the credit of the contractor alone. The fact that the materials are charged on the plaintiff's books to the contractor alone affords some slight evidence that they were furnished on his credit, but it is not prima facie evidence that his credit was relied on to the exclusion of the credit of the building. *Hommel v. Lewis*, 104 Pa. St. 465; *Frudden Lumber Co. v. Kinnan*, 117 Iowa 93, 90 N. W. 515.

Delivery of part.—The fact that the material man delivered part of the materials on the premises sought to be charged was no evidence that they were sold on the credit of the building. *Crane Co. v. Neel*, 104 Mo. App. 177, 77 S. W. 766.

²⁰ *Green v. Thompson*, 172 Pa. St. 613, 33 Atl. 702.

are to be used in a designated building, or other improvement, and shall thereafter use, or cause to be used, the said materials, in the construction of any building or improvement other than that designated, without the written consent of the person of whom the materials were purchased, with intent to defraud such person, shall be punished by a fine not exceeding five hundred dollars."²¹

§ 24. **Contract, necessity for.**—While the courts of some of the states have upheld as constitutional,¹ laws giving material men and sub-contractors a lien, when there was nothing due the contractor under the contract with the owner, yet no state has attempted to engraft a lien on a man's real estate without a contract either express or implied,² upon the part of the owner.³ This contract as to its validity and scope is construed after the manner of ordinary contracts. There must be a person in existence to make the contract, and such person must have some interest or ownership in the property, and he must be capable of contracting. This contract must

²¹ 97 Gen. Laws of Ohio, p. 499.

¹ See § 4.

² *Muldoon v. Pitt*, 54 N. Y. 272; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095.

³ *Arkansas*.—*Galbreath v. Davidson*, 25 Ark. 490, 99 Am. Dec. 233.

Georgia.—*Powers v. Armstrong*, 19 Ga. 427.

Illinois.—*Tracy et al. v. Rogers*, 69 Ill. 664.

Indiana.—*Ogg v. Tate*, 52 Ind. 159.

Iowa.—*Redman v. Williamson*. 2 Iowa, 488.

Kansas.—*Doane v. Bever*, 62 Kan. 458, 65 Pac. 693.

Massachusetts.—*Peabody v. Eastern Methodist Soc.*, 87 Mass. (87 Allen) 540.

Michigan.—*Wagar v. Briscoe*, 38 Mich. 587.

Missouri.—*Louisiana & Gulf Lumber Co. v. Myers*, 87 Mo. App. 671; *Badger Lumber Co. v. Stepp*, 157 Mo. 366, 57 S. W. 1059.

New York.—*Muldoon v. Pitt*, 54 N. Y. 269; *Dressel v. French*, 7 How. Prac. (N. Y.) 350; *Johnson v. Alexander*, 48 N. Y. S. 541, 23 App. Div. 538.

North Carolina.—*Nicholson v. Nichols*, 115 N. C. 200, 20 S. E. 294; *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513.

Oregon.—*Sellwood Lumber Co. v. Monnell*, 26 Or. 267, 38 Pac. 66.

Pennsylvania.—*Long v. Black*, 5 Pa. Co. Ct. R. 258.

South Carolina.—*Gray v. Walker*, 16 S. Car. 143.

necessarily control many features connected with the lien, its existence and scope. Some statutes instead of declaring that the material or services shall be furnished or performed under a contract with the owner use the expression "by the consent of the owner." This practically means such circumstances as may imply a contract.⁴

§ 25. **Contract, necessity for (continued).**—A married woman's consent to a contract for materials to be used on her lands will not be implied from the mere fact that the contracting person was her husband.⁵ In such cases it must be shown that he was authorized to act for that purpose,⁶ it is not

Tennessee.—Gillisple v. Stanton, 67 Tenn. 284.

Utah.—Morrison v. Clark, 20 Utah 432, 59 Pac. 235.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 55.

⁴ **California.**—San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255.

Connecticut.—Huntley v. Holt, 58 Conn. 449.

Illinois.—Brokaw v. Tyler, 91 Ill. App. 148.

Massachusetts.—Stevens v. Inhabitants, 114 Mass. 476.

Missouri.—Sibley v. Casey, 6 Mo. 164.

Nebraska.—Tidball v. Holyoke, 70 Neb. 726, 97 N. W. 1019; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

New York.—McGraw v. Godfrey, 16 Abb. Prac. (N. S.) (N. Y.) 358.

Texas.—Warren v. Smith, 44 Tex. 245.

Wisconsin.—Wheeler v. Hall, 41 Wis. 447.

A son allowed his mother to occupy his house for three years while he was absent from the

state. She contracted in her own name for the erection of another house on the lot, representing that it was her own. The son had previously authorized her to make other improvements on the lot, and had sent her money to pay for them. He refused to pay for the house, and would not let the builder remove it, but took possession and rented it. The builder could not enforce a mechanic's lien. *Sheer v. Cummings*, 80 Tex. 29, 16 S. W. 37.

The consent intended by the law is an absolute consent, consistent with the right to do the work on the credit of the building. *McClintock v. Criswell*, 67 Pa. (17 P. F. Smith) 183.

⁵ *Lyon v. Champion*, 62 Conn. 75, 25 Atl. 392; *Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39. If the deed had not been on record it might have been different. *Schwartz v. Saunders*, 46 Ill. 18; *Fetter v. Wilson*, 51 Ky. (12 B. Mon.) 90.

⁶ *Schmidt v. Joseph*, 65 Ala. 475; *Groth v. Stahl*, 3 Colo. App. 8, 30 Pac. 1051; *Dearie v. Mar-*

enough that the wife merely allows the work to be done.⁷ A power to bind the wife is sometimes presumed where it is shown that she gave her husband full charge of her estate and allowed him to collect and appropriate the rent.⁸ In some states a lien cannot attach to a homestead except by express agreement and a compliance with all the statutory requirements.⁹ Another provision is that a wife cannot be bound, unless she so agrees in writing.¹⁰ But where such matters are required in order to bind a homestead, generally the wife's consent is not required.¹¹ And in all cases if she wishes to defeat the lien she must not stand by and allow work to proceed.¹² The contract with a lessor will not be implied merely because he consents to improvements which are of no advan-

tin, 78 Pa. 55. If authorized to build at his "own expense," she is not bound. *Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111.

⁷*Garnett v. Berry*, 3 Mo. App. 197; *Lyon v. Champion*, 62 Conn. 75, 25 Atl. 392.

Proof of Agency.—So far as the record shows, the lot was bought by the husband and with his money, and the title put by him in his wife's name without her knowledge. He made the contract with *Wheelon & Hall* for the express purpose of building a home for his family, and at the time that the contract was made and the work done it is quite improbable that Mrs. Stahl knew she was the owner of the lots. Under these circumstances no agency can be implied. What the case contains to show her knowledge that her husband was going to build, that the work was done and that she took a lively

wifely interest in the progress of the labor, does not amount to that proof of agency which the law requires when the man seeks to charge it with a lien for supplies which were furnished under a contract entered into with one who was not the owner of the property. *Groth v. Stahl*, 3 Colo. App. 8, 30 Pac. 1051.

⁸*Kline v. Perry*, 51 Mo. App. 422; *Keller v. Struck*, 31 Minn. 446, 18 N. W. 280; *Coleman v. Ballandi*, 22 Minn. 144; *Merchant v. Perez*, 11 Tex. 20.

⁹*Cameron v. Marshall*, 65 Tex. 7.

¹⁰*Cameron v. Gebbard*, 85 Tex. 610; *Lyon v. Ozee*, 66 Tex. 96; *Walker v. House* (Tex. Civ. App.), 24 S. W. 82; *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907.

¹¹*Miner v. Moore*, 53 Tex. 224; *Tinsley v. Boykin*, 46 Tex. 599.

¹²*Phelps Biglow Windmill Co. v. Shay*, 32 Neb. 19, 48 N. W. 896.

tage to him.¹³ If he has no knowledge, he cannot consent;¹⁴ but if he participates in the construction,¹⁵ or in any way authorizes the work to be done, a contract with him will be implied.¹⁶ A purchaser to make a binding contract must have some kind of title.¹⁷ The death of the owner while the work is being done, and before the lien is perfected, terminates the contract and the lien fails unless the statute expressly provides otherwise.¹⁸ However, in some instances liens are upheld where the contract was completed after the death of the owner with the consent of the administrator.¹⁹ Consequential damages that result from a breach of the contract are not to be considered as part of the contract and will not give a lien.²⁰ So the protesting of a draft will not be included in the contract, nor a loss of time to men, or delay, risk, and inconvenience to contractor.²¹ Extra work, outside the fair scope of

¹³ *Hoffman v. Laurans*, 18 La. (O. S.) 70; *Havens v. West Side Electric Light & Power Co.*, 66 Hun. 626, 20 N. Y. Supp. 764.

¹⁴ *Hanson v. News Publishing Co.*, 97 Me. 99, 53 Atl. 990.

¹⁵ *Havens v. West Side Electric Light & Power Co.*, 66 Hun. 626, 20 N. Y. Supp. 764.

¹⁶ *Penfield v. Harris*, 7 Tex. Civ. App. 659, 27 S. W. 762; *Wilkinson v. Rust*, 57 Ind. 172; *Hoffman v. Laurans*, 18 La. (O. S.) 70; *Sewall v. Duplessis*, 2 Rob. (La.) 66.

¹⁷ A mechanic's lien can be enforced against the owner of a lot who knowingly suffers a verbal sale of it through an agent to a person, and the erection of a building thereon by the purchaser pursuant to such sale. *West v. Pullen*, 88 Ill. App. 620; *Dustin v. Crosby*, 75 Me. 75; *Heminway v. Cutler*, 51 Me. 407; *Contra Pullen v. Bell*, 40 Me. 314; *Et-*

tridge v. Bassett, 136 Mass. 314; *Dodge v. Romain* (N. J. L.), 18 Atl. 114; *Rossi v. MacKellar* (Com. Pl.) 13 N. Y. Supp. 827.

¹⁸ *Meyers v. Bennett*, 7 Daly (N. Y.) 471; *Brown v. Zeiss*, 9 Daly (N. Y.) 240.

¹⁹ *Boynton v. Westbrook*, 74 Ga. 68; *Wagner v. Mambeck*, 18 Pa. Co. Ct. R. 471.

In *Williams v. Webb*, 2 Disn. (Ohio) 430, it was held that the death of the owner, before the lien was taken did not prevent the perfection of the lien. And in *Pifer v. Ward*, 8 Blackf. (Ind.) 252, it was held that if it accrues in the lifetime of the owner it could be enforced.

²⁰ *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.) 729; *Hale v. Johnson*, 6 Kan. 137.

²¹ *Bradbury v. Idaho & O. Land Imp. Co.*, 2 Idaho 221, 10 Pac. 620; *Lee v. Brayton*, 18 R. I. 232, 26 Atl. 256.

the contract, cannot be included²² unless such extras were necessary to the completion of the work and hence impliedly included in the original contract.²³ Ordinarily the contract is not to be governed by the specifications, although they may be consulted in its interpretation.²⁴ Equity cannot supply or do away with the necessity of the contract.²⁵ A contract made with a company not in existence at the time it was entered into, cannot be the basis of a lien.²⁶

§ 26. **Contract with owner.**—It is not only necessary that there be a contract, but the contract must be with a person who has some kind of an ownership. This phase of the subject was referred to when we considered the property subject to a lien.¹ Unless the evidence shows that the person making the contract had some kind of an ownership recognized by the law as such, the lien must fail.^{1a} In this connection it has been held that possession is a species of legal title, though of the lowest, and it alone is *prima facie* evidence of the highest estate in the property and is good against all the world except the true owners and will support a lien.² In some cases it has been

²² *Brown v. Lowell*, 79 Ill. 484; *Wetmore v. Marsh*, 81 Iowa 677, 47 N. W. 1021; *Mulrey v. Barrow*, 93 Mass. (11 Allen) 152; *Pullis v. Hoffman*, 28 Mo. App. 666; *Morgan v. Stevens*, 6 Abb. N. C. (N. Y.) 357; *Gier v. Dalber*, 148 Mich. 190, 111 N. W. 773, 14 Detroit Leg. N. 183.

²³ *Rush v. Able*, 90 Pa. 153.

²⁴ Putting in a catch basin is not included. *Lee v. Brayton*, 18 R. I. 232, 26 Atl. 256.

²⁵ *Wright v. Meyer* (Tex. Civ. App.), 25 S. W. 1122; *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 P. 989.

²⁶ *Littleton Sav. Bank v. Osceola Land Co.*, 76 Iowa 660, 39 N. W. 201.

¹ See § 10.

^{1a} *Dierks v. Walrod*, 66 Iowa 354, 23 N. W. 751; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391; *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 Pac. 713.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 56.

² *Dakin v. Lecklider*, 19 Ohio Cir. Ct. R. 254, 10 O. C. D. 308. Where constitution grants liens, it has been allowed on the building, even if the person contracting for same falsely represented himself as the owner. *Linck v. Melkeljohn*, 2 Cal. App. 506, 84 Pac. 309.

held that constructive possession will suffice.³ But it should be observed that this is only sufficient where no better title is shown, and the person purchasing under a foreclosure of the lien on this kind of a title will only get what the person contracting had. There may be cases where neither possession nor legal title will conclusively show ownership, as where the land is sold while the work is in progress.⁴ A mere momentary possession is not sufficient to give a lien precedence over a purchase money mortgage.⁵ The title of an executor⁶ or guardian, without an order of court,⁷ a widow before dower is assigned,⁸ a purchaser at judicial sale, before deed is delivered,⁹ an insurance company rebuilding a house to discharge their liability for one burned,¹⁰ heirs before the death of their ancestor,¹¹ and where under some statutes the estate is in administration, is not ordinarily sufficient to support a lien.¹² As previously stated,^{12a} equitable ownership is sufficient,¹³ but not a mere naked equitable right.¹⁴ A contracting person in possession has been held to have sufficient ownership to give a lien.¹⁵ If a leasehold interest is to be held subject to a lien the lessee must make the contract, within the terms of the lease.¹⁶ Under some statutes, however, a landlord's estate has been held liable for contracts made by a tenant, when the

³ Prutzman v. Bushong, 83 Pa. 526.

⁴ Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 Pac. 153.

⁵ Clark v. Butler, 32 N. J. Eq. 664.

⁶ San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255.

⁷ Copley v. O'Neill, 39 How. Prac. (N. Y.) 41.

⁸ Ermul v. Kullok, 3 Kan. 499.

⁹ Robbins v. Arendt (Com. Pl.) 4 Misc. (N. Y.) 196, 23 N. Y. Supp. 1019.

¹⁰ Bruner v. Sheik, 9 Watts & S. (Pa.) 119.

¹¹ Watson v. Woods, 3 R. I. 226.

¹² San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255.

¹³ Atkins v. Little, 17 Minn. 342; Giesberg v. Mutual Bldg. &c. Assn. (Tex. Civ. App.), 60 S. W. 478.

¹⁴ Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. 809.

¹⁵ Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. 632; Anderson v. Berg, 174 Mass. 404, 54 N. E. 877.

¹⁶ Newell v. Haworth, 66 Pa. St. 363; Pickel Marble & Granite

landlord knowingly permitted the improvements to be made.¹⁷ While a vendor's lien is not an ownership sufficient to support the contract,¹⁸ a vendee in possession has been held to be an owner within the statute.¹⁹ A tenant in common in possession has sufficient ownership,²⁰ and if the other tenant consents, the entire estate will be held.²¹ Where the doctrine of community property applies, the husband has sufficient ownership.²² A partner may bind a partnership.²³ A person in possession, holding title in trust for another, has an ownership sufficient to support the contract,²⁴ though the naked title is in another.²⁵ In some few states where the owner is held for the acts of the lessee, the right to the lien will be supported if the contract is made with the owner of the building.²⁶ And if a person does not own the property at the time he makes the contract, but afterwards becomes such

Co. v. Handlan, 85 Mo. App. 313; *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186.
Central of Georgia Ry. Co. v. Shiver, 125 Ga. 218, 53 S. E. 610.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 58.

¹⁷ *Wells v. Sherwin*, 92 Ill. App. 282.

¹⁸ *Griffin v. Seymour*, 15 Colo. App. 487, 63 Pac. 809.

¹⁹ *Beck v. Catholic University of America*, 62 App. Div. (N. Y.) 599, 71 N. Y. Supp. 370; *Salzer Lumber Co. v. Claflin*, 16 N. Dak. 601, 113 N. W. 1036.

²⁰ *Keller v. Denmead*, 68 Pa. St. 449; *Seely v. Neill*, 37 Colo. 198, 86 Pac. 334; can only bind his own interest however.

²¹ *Dalton v. Tindolph*, 87 Ind. 490; *Wilson v. Logue*, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. 426.

²² *Littell &c. Mfg. Co. v. Miller*, 3 Wash. St. 480, 28 Pac. 1035;

²³ *Christian v. Illinois Malleable Iron Co.*, 92 Ill. App. 320; *Van Court v. Bushnell*, 21 Ill. 624.

²⁴ *Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084; *Bartlett v. Mahlum*, 88 Iowa 329, 55 N. W. 514; *Hall v. Bullock* (Ky.), 97 S. W. 351, 29 Ky. L. 1254.

²⁵ *Weaver v. Sheeler*, 124 Pa. St. 473, 17 Atl. 17, 23 W. N. C. (Pa.) 366; *Cheatham v. Rowland*, 92 N. Car. 340.

²⁶ *Colorado*. — *Stevenson v. Woodward*, 3 Cal. App. 754, 86 Pac. 990.

Iowa. — *Lane v. Snow*, 66 Iowa 544, 24 N. W. 35.

Minnesota. — *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725.

Missouri. — *Seaman v. Paddock*, 51 Mo. App. 465.

New York. — *Muldoon v. Pitt*, 4 Daly (N. Y.) 105.

owner as is recognized by law, the property will be subject to the lien.²⁷ In such case the party must either be in possession or must show that the material was purchased for that particular building,²⁸ or it must appear that the owner consented to the continuance of the work,²⁹ or assumed the debt.³⁰ A change of ownership during the continuance of the work will not deprive the person performing the work of his lien,³¹ for such materials as were included in the original contract.³² If a purchaser is made aware of the conditions of the contract and the owner and contractor know this and thereafter make changes, the purchaser's rights will not be affected.³³ While a lessee has an ownership sufficient to support the contract, it must not be forgotten that his interest only is liable to the lien.³⁴ The landlord may so act as to make

²⁷ **Colorado.**—Tritch v. Norton, 10 Colo. 337, 15 Pac. 680.

Kansas.—Jarvis-Conklin Mortg. Trust Co. v. Sutton, 46 Kan. 166, 26 Pac. 406.

Massachusetts.—Corbett v. Greenlaw, 117 Mass. 167.

New York.—McGraw v. Godfrey, 16 Abb. Pr. (N. S.) (N. Y.) 358.

Texas.—Schultze v. Alamo Ice &c. Co., 2 Tex. Civ. App. 236; 21 S. W. 160.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 59.

²⁸ **Chicago Lumber Co. v. Fretz**, 51 Kan. 134, 32 Pac. 908; **Howard v. Veazle**, 69 Mass. (3 Gray) 233.

²⁹ **Bell v. Cooper**, 26 Miss. 650; **Wagar v. Briscoe**, 38 Mich. 587; **De Ronde v. Olmstead**, 5 Daly (N. Y.) 398, 47 How. Pr. (N. Y.) 175.

³⁰ **Mountain City Market House &c. Assn. v. Kearns**, 103 Pa. St. 403.

³¹ **Colorado.**—Mellor v. Valentine, 3 Colo. 255.

Indiana.—Jeffersonville Water Supply Co. v. Ritter, 138 Ind. 170, 37 N. E. 652.

Maryland.—Miller v. Barroll, 14 Md. 173.

New Jersey.—Gordon v. Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

New York.—Gross v. Daly, 5 Daly (N. Y.) 540; **Rollin v. Cross**, 45 N. Y. 766.

³² **Heath v. Tyler**, 44 Md. 312.

³³ **Soule v. Dawes**, 7 Cal. 575.

³⁴ **Missouri.**—Squires v. Fifthian, 27 Mo. 134; **McMahon v. Vickery**, 4 Mo. App. 225.

Nebraska.—Waterman v. Stout, 38 Neb. 396, 56 N. W. 987.

New York.—Jones v. Crumb, 53 Hun (N. Y.) 631, 6 N. Y. Supp. 338.

North Dakota.—Salzer Lumber Co. v. Claflin, 16 N. Dak. 601, 113 N. W. 1036.

Pennsylvania.—Anshutz v. McClelland, 5 Watts (Pa.) 487.

Tennessee.—Alley v. Lanier, 41 Tenn. (1 Cold.) 540.

the entire estate liable.³⁵ As a matter of course where the lien is on the building separate from the land, it will attach to the building, even though the landlord did not consent.³⁶ A mortgagor is usually an owner within the meaning of the statute, but he cannot be considered such after a decree of foreclosure has been entered.³⁷ The interest of a pre-existing mortgagee cannot be affected by the contract.³⁸ Where the title is in the mortgagee his ownership is, of course, sufficient to support the lien.³⁹

§ 27. **Contract with the owner (continued).**—As before stated, the mere fact that a person is in lawful possession and control of the land will not make him an owner sufficient to give a lien.¹ However, if the actual owner permits a person in possession to exercise ownership, the latter becomes *prima facie* an owner and in some cases may make the property liable.²

³⁵ *Leismann v. Lovely*, 45 Wis. 420; *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. 862; *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546.

³⁶ *Lynam v. King*, 9 Ind. 3, *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 432, 56 N. E. 615; *Ombony v. Jones*, 21 Barb. (N. Y) 520. The lessor in a lease which provides certain repairs shall be done by lessee, and the cost deducted from rent is not the owner, as regards persons employed by lessee. *Garring v. Hunt*, 27 Ont. R. 149.

³⁷ *Davis v. Connecticut Mut. Life Ins. Co.*, 84 Ill. 508.

³⁸ *Broman v. Young*, 35 Hun (N. Y.) 173.

³⁹ *Price v. Merritt*, 55 Mo. App. 640.

¹ *Arkansas*.—*Miller Hardwood Lumber Co. v. Wilson*, 56 Ark. 380, 19 S. W. 974.

Colorado.—*Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 33 Pac. 153.

Illinois.—*Tracy v. Rogers*, 69 Ill. 662; *Underhill v. Corwin*, 15 Ill. 556.

Massachusetts. — *Fletcher v. Stedman*, 159 Mass. 124, 34 N. E. 183.

Mississippi.—*Hawley v. Henderson*, 34 Miss. 261, See § 44.

² *Chambers v. Benoist*, 25 Mo. App. 520; *Gaskill v. Davis*, 63 Ga. 645; *Dakin v. Lecklider*, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308. See Dec. and Am. Dig. tit *Mechanics' Liens*, § 60. Under the statute of Utah, one who takes possession of land for the purpose of constructing a ditch is an owner. *Bear Lake, etc., Wat-*

A purchaser in possession,³ under an executory contract, is an owner.⁴ Of course the contract must be a legal one,⁵ but as possession obviates the necessity of its being in writing, under the statute of frauds, a verbal contract is generally held sufficient.⁶ Even if the contract is invalid, if the purchaser afterwards gets possession he is an owner within the meaning of the statute.⁷ But there must be some element of title besides mere possession to bring such a person within the statute.⁸ In the case of purchasers in possession under their contract to purchase, it is generally held that the lien does not take precedence over the claim of the vendor. The mechanic or material man is bound to know what title the purchaser has.⁹ As a general rule it may be said that the purchaser can-

erworks & Irr. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. 7.

³ Mitchell Vance Co. v. Daiker (Com. Pl.), 19 N. Y. Supp. 378, 46 N. Y. St. 189; Blight v. Ray, 23 Ont. R. 415; Reggin v. Manes, 22 Ont. R. 443.

⁴ Iowa.—Monroe v. West, 12 Iowa 119, 79 Am. Dec. 524.

Kansas.—Mylvane v. Chicago Lumber Co., 56 Kan. 675, 44 Pac. 613; Pierce v. Osborn, 40 Kan. 168, 19 Pac. 656.

Missouri.—Sawyer-Austin Lumber Co. v. Clark, 172 Mo. 558, 73 S. W. 137.

New Jersey.—Scott v. Reeve, 10 N. J. L. 12.

South Dakota.—Pinkerton v. Le Beau, 3 S. Dak. 440, 54 N. W. 97.

Utah.—Carey-Lombard Co. v. Partridge, 10 Utah 322, 37 Pac. 572.

Contra. Hayes v. Fessenden, 106 Mass. 228; Long Island Brick Co. v. Arnold, 18 R. I. 455, 28

Atl. 801; Faber v. Muir, 27 Tex. Civ. App. 27, 64 S. W. 938; Barnard v. Adorjan, 116 App. Div. (N. Y.) 535, 101 N. Y. Supp. 502.

⁵ Wilkins v. Litchfield, 69 Iowa 465, 29 N. W. 447; Huff v. Jolly, 41 Kan. 537, 21 Pac. 646; Conner v. Lewis, 16 Me. 268; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. 616.

⁶ Meyer Bros. Drug Co. v. Brown, 46 Kan. 543, 26 Pac. 1019; Crocker v. Currier, 65 Wis. 662, 27 N. W. 825; Contra. Gray v. Carleton, 35 Me. 481.

⁷ Weaver v. Sheeler, 124 Pa. 473, 17 Atl. 17, 23 W. N. C. 366.

⁸ Johnson v. Pike, 35 Me. 291; Brown v. Morison, 5 Ark. 217.

⁹ Georgia.—Callaway v. Freeman, 29 Ga. 408.

Michigan.—Scales v. Griffin, 2 Doug. (Mich.) 54.

New York.—Bernard v. Adorjan, 43 Misc. (N. Y.) 276, 88 N. Y. Supp. 859; Beck v. Catholic University of America, 172 N. Y. 387, 60 L. R. A. 315; Schnauffer

not subject property to a mechanic's lien to the prejudice of the legal owner,¹⁰ nor can the vendee and vendor by secret stipulations between themselves prejudice the rights of the lienor.¹¹ Where a contract between vendor and vendee stipulates that the vendee shall erect certain buildings, this puts the vendee in the position of an owner, and he may subject

v. Ahr, 53 Misc. (N. Y.) 299, 103 N. Y. Supp. 195.

Pennsylvania.—Dietrich v. Crabtree, 8 W. N. C. (Pa.) 418, 7 Leg. & Ins. Rep. 125.

Texas.—Galveston Exhibition Assn. v. Perkins, 80 Tex. 62, 15 S. W. 633.

¹⁰ Pinkerton v. Le Beau, 3 S. Dak. 440, 54 N. W. 97; Scales v. Griffin, 2 Doug. (Mich.) 54.

¹¹ Malmgren v. Phinney, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490; Garland v. Van Rensselaer, 71 Hun (N. Y.) 2, 24 N. Y. Supp. 781.

What stipulations binding.—S. entered into an agreement to sell certain lots to J. on credit, which agreement provided that J. was to build a house on the lots, and when the house was inclosed S. was to convey to J. when J. was authorized to make certain mortgages. It was also stipulated that until the deed and mortgages were made, as provided, the legal and equitable title should remain in S. and that J. could not subject the property to any liens. The deed and mortgage were made as provided in the contract, but some time prior to their execution J. purchased from a lumber company material for use in

the construction of the house, but did not pay for the same, and the lumber company filed a statement for a lien on the lots against J. as owner. Held, that the contract under which J. held, limited his interest and ownership and his right to create liens on the lots, and that the lien of the lumber company was subordinate to the mortgage liens given in pursuance of the contract. *Chicago Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592.

Mere knowledge of vendor insufficient.—“F. sells a town lot to R. and S. and takes their notes for the purchase money, giving them a bond to make title when the money is paid. The vendees go into possession, and employ C. to make certain improvements; C. files and records his mechanic's lien, and sues and recovers judgment on his claim against R. and S. In the meantime the purchasers finding they are unable to pay, agree to rescind the contract, taking up their notes and surrendering to F. his bond for title. The lot is levied on by the fl. fa., in favor of C. against R. and S., and claimed by F. Held that the property is not subject to the debt, notwithstanding F. had knowledge of the work while it was being done, and made no ob-

the entire interest to a lien.¹² In such cases the fact that the vendee forfeited his contract will not absolve the property from liability to the lien.¹³ Where the contract stipulated that a mortgage should be given for the unpaid purchase money, the lien will not be prior to such mortgage.¹⁴ The fact that the owner advances money to a purchaser to build, will not give to the latter the ownership required by statute.¹⁵ Whatever right the purchaser has, however, is subject to the lien.¹⁶ Ground rent has in some cases been held to be sufficient to confer the required ownership on a purchaser.¹⁷

jection. *Callaway v. Freeman*, 29 Ga. 408.

Co-operate in plans.—*Guion v. Ryckman*, 77 Neb. 833, 110 N. W. 759.

¹² **Colorado.**—*Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108.

Illinois.—*Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532n.

Minnesota.—*Hill v. Gill*, 40 Minn. 441, 42 N. W. 294.

Massachusetts.—*Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413; *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. 1134; *Carew v. Stubbs*, 155 Mass. 549, 30 N. E. 219; *Davis v. Humphrey*, 112 Mass. 309; *Hilton v. Merrill*, 106 Mass. 528.

Missouri.—*O'Leary v. Roe*, 45 Mo. App. 567.

Nebraska.—*Sheehy v. Fulton*, 38 Neb. 691, 57 N. W. 395, 41 Am. St. 767.

New Jersey.—*Young v. Willson*, 44 N. J. L. 157.

New York.—*Schmalz v. Mead*, 125 N. Y. 188, 26 N. E. 251; *Hackett v. Badeau*, 63 N. Y. 476; *Hart v. Wheeler*, 1 Th. & C. (N. Y.) 403; *McDermott v. Palmer*, 11 Barb. (N. Y.) 9; *Hobby v. Day*,

51 Hun (N. Y.) 644, 3 N. Y. Supp. 900; *Garland v. Van Rensselaer*, 71 Hun (N. Y.) 2, 24 N. Y. Supp. 781.

Wisconsin.—*Edwards, etc., Lumber Co. v. Mosher*, 88 Wis. 672, 60 N. W. 264.

¹³ *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490. On building alone, not on land. *Jameson v. Gile*, 98 Iowa 490, 67 N. W. 396; *Irish v. O'Hanlon*, 34 Neb. 786, 52 N. W. 695; *Pinkerton v. Le Beau*, 3 S. Dak. 440, 54 N. W. 97; *Schnauffer v. Ahr*, 53 Misc. (N. Y.) 299, 103 N. Y. Supp. 195.

¹⁴ *Shearer v. Wilder*, 56 Kan. 252, 43 Pac. 224.

¹⁵ *McGinniss v. Purrington*, 43 Conn. 143; *Associates of Jersey City v. Davison*, 29 N. J. L. 415.

¹⁶ *Hallahan v. Herbert*, 11 Abb. Pr. (N. S.) (N. Y.) 326; *Hart v. Wheeler*, 1 Th. & C. (N. Y.) 403.

¹⁷ *Carson v. Boudinot*, 2 Wash. C. C. (U. S.) 33, 5 Fed. Cas. No. 2,462; *Gaule v. Bilyeau*, 25 Pa. St. 521. Where the vendor of real estate has done nothing to authorize the vendee to improve the premises, and the latter, on his own respon-

If a vendor has parted with possession of the premises,¹⁸ and does nothing to mislead the material man, he is not an owner within the meaning of the statute,¹⁹ so as to subject his interest to a lien.²⁰ Where a lease stipulates that the lessee is to make certain improvements, the same rule is applied as where in an executory contract a stipulation is made for improvements, and in such cases the lessee is the owner and his interest and the landlord's may be made subject to a lien for such improvements.²¹ In such cases the material man is chargeable with notice of the terms of the recorded lease,²² and if the lease stipulates there shall be no lien, such stipulation will control.²³ The improvements must come within

sibility, incurs a liability with the builder, the lien of the mechanic will be confined to the interest of the purchaser in the premises, and the vendor can not be required to part with his title until the purchase price is fully paid. But where the vendor by his contract of sale, expressly authorizes his vendee to erect a building on the premises, agreeing to advance money to aid in such improvement as the work progresses, and before any termination of the contract, and notice thereof, a mechanic furnishes materials and performs labor in the erection of such building, the latter will not be required to look alone to the title held by the vendee, but may enforce his lien against the legal as well as the equitable title. *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490.

¹⁸ *Marston v. Stickney*, 60 N. H. 112.

¹⁹ *Faber v. Muir*, 27 Tex. Civ. App. 27, 64 S. W. 938.

²⁰ *Pickens v. Plattsmouth Inv. Co.*, 37 Neb. 272, 55 N. W. 947.

²¹ *Minnesota*. — *John Martin Lumber Co. v. Wood*, 42 Minn. 433, 44 N. W. 315; *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313.

New York. — *Cornell v. Barney*, 94 N. Y. 394; *Burkitt v. Harper*, 79 N. Y. 273; *Mosher v. Lewis*, 10 Misc. (N. Y.) 373, 31 N. Y. Supp. 433.

Pennsylvania. — *Boteler v. Espen*, 99 Pa. St. 313; *Barclay v. Wainright*, 86 Pa. St. 191; *Fisher v. Rush*, 71 Pa. St. 40; *Leiby v. Wilson*, 40 Pa. St. 63; *Woodward v. Leiby*, 36 Pa. St. 437; *Rush v. Perot*, 12 Phila. (Pa.) 175, 34 Leg. Int. (Pa.) 58; *Long v. Mc-Lanahan*, 103 Pa. St. 537; *Hopper v. Childs*, 43 Pa. St. 310.

Wisconsin. — *Cook v. Goodyear*, 79 Wis. 606, 48 N. W. 860.

²² *Cornell v. Barney*, 94 N. Y. 394. But it must be such a lease as the law allows to be recorded. *Mosher v. Lewis*, 10 Misc. (N. Y.) 373, 31 N. Y. Supp. 433.

²³ *Boone v. Chatfield*, 118 N. Car. 916, 24 S. E. 745.

the terms of the lease.²⁴ Where it is held that the lessor may be bound if he has notice of the improvements, the fact that he lives in the neighborhood and the work is apparent, will not be sufficient notice to bind his interest;²⁵ but if he assists in the work, notice will be presumed.²⁶

§ 28. **Who is owner—Ohio Statute.**—Section 3184f of the Ohio statute provides that every person, including cestuis que trust, for whose immediate use, enjoyment, or benefit any building, erection or improvement shall be made, shall under this act be included in the words owner or proprietor.²⁷ A cestui que trust is defined to be "The beneficiary of an estate, held in trust; he for whose benefit another person is enfeoffed or seized of lands or tenements, or is possessed of personal property."²⁸

§ 29. **Capacity to Contract.**—The same capacity on the part of the owner of land to make a contract that will be the basis of a lien is required, as in the making of any other contract. If the owner is under such disability as would invalidate any contract that he might enter into, it would naturally follow that he could not by contract confer a right to a lien.¹ The liability for the debt rests upon the validity of the contract, the lien being a mere incident thereto.² Idiots and lunatics and infants can not make a binding contract, and it is the duty of the person furnishing labor or material to ascertain that the person to whom he is furnishing such labor or ma-

²⁴ Mosher v. Lewis, 10 Misc. (N. Y.) 37, 31 N. Y. Supp. 433, sidewalk not; Regan v. Borst, 11 Misc. (N. Y.) 92, 32 N. Y. Supp. 810, not in writing.

See Dec. and Am. Dig. tit. Mechanics' Liens, § 63.

²⁵ Francis v. Sayles, 101 Mass. 435; Knapp v. Brown, 45 N. Y. 207, 11 Abb. Pr. (N. S.) (N. Y.) 118.

²⁶ Otis v. Dodd, 24 Hun (N. Y.) 538; Cornell v. Barney, 94 N. Y. 394.

²⁷ Ohio R. S. 3184f. 86 Gen. p. 373, 375.

²⁸ 6 Cyc. p. 845. See § 222.

¹ Choteau v. Thompson, 20 Ohio St. 114; Cornell v. Barney, 94 N. Y. 394; Knapp v. Brown, 45 N. Y. 207. See Dec. & Am. Dig. tit. Mechanics' Liens, § 66.

² Hall v. Acken, 47 N. J. L. 340; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Spring Brook Lum-

terial, is not under a disability that would avoid his contract.³ In case of infancy it is held that the retention of the building after he becomes of legal age is not such a ratification of the contract as will give validity to a lien.⁴ Under former laws married women were not liable for contracts generally, but these restrictions have been removed, and the contracts of married women now stand upon the same footing as those of other persons.⁵ In some few states where the married woman is still under a modified form of disability, some question has been raised as to her power to make her property liable for a claim such as will support a mechanic's lien.⁶ In previous sections,⁷ consideration has been given to the question of the ownership necessary to give one the right to make the property liable to a lien, and it is assumed in this section that the capacity to contract is not questioned upon that ground.

ber Co. v. Watkins, 26 Pa. Super. Ct. 199.

³ *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. Dec. 418; *Price v. Jennings*, 62 Ind. 111.

⁴ *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. 690.

⁵ *Illinois*.—*Greenleaf v. Beebee*, 80 Ill. 520.

Indiana.—*Stephenson v. Ballard*, 82 Ind. 87; *Capp v. Stewart*, 38 Ind. 479; *Littlejohn v. Millirons*, 7 Ind. 125.

Iowa.—*Greenough v. Wigginton*. 2 G. Greene (Iowa) 435.

Kentucky.—*Jefferson v. Hopson Bros. (Ky.)* 84 S. W. 540, 27 Ky. L. 140.

Minnesota.—*Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205; *Carpenter v. Wilverschied*, 5 Minn.

170; *Carpenter v. Leonard*, 5 Minn. 155.

Missouri.—*Tucker v. Gest*, 46 Mo. 339; *Carthage Marble & White Lime Co. v. Bauman*, 44 Mo. App. 386.

New York.—*Hauptman v. Catlin*, 20 N. Y. 247.

Ohio.—*Machir v. Burroughs*, 14 Ohio St. 519.

Pennsylvania.—*Germania Sav. Bank, Appeal of*, 95 Pa. St. 329. See § 38.

⁶ *Alabama*.—*Cutcliff v. McAnnally*, 88 Ala. 507, 7 So. 331; *Wadsworth v. Hodge*, 88 Ala. 500, 7 So. 194; *Youngblood v. McAnnally*, 88 Ala. 512, 7 So. 263.

Florida.—*O'Neil v. Percival*, 20 Fla. 937, 51 Am. Rep. 634.

Kentucky.—*Roberts v. Riggs*, 84 Ky. 251, 1 S. W. 431, 8 Ky. L. 247.

⁷ See §§ 24, 25.

§ 30. **Contract—Authority to make.**—If the party contracting is not an owner within the meaning of the statutes,¹ it must be shown that he acts by authority from the owner.² This is a matter of agency and is established as such authority is usually established. There may be cases when the person is apparently authorized to so act, but has no authority by reason of the capacity in which he is acting; thus, a guardian,³ without order of court,⁴ has not authority to make a contract, and the same rule is applied to an administrator,⁵ unless the statute under which he is acting gives him authority.⁶ The mere fact that a person is an adjoining land owner will not give authority to erect a building extending over another's premises.⁷ So a corporation that was not in existence at the time the contract was made would be wanting in authority to contract.⁸ The question of authority to make a contract, arises most frequently in cases where one assumes to act as an agent. The authority of the agent may be either express or implied.⁹ If the authority to contract is conceded, then the lien is not void because the agent exceeds his au-

¹ See §§ 10, 26-29.

² *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401. See Dec. & Am. Dig. tit Mechanics' Liens, § 69.

³ *Copley v. O'Neill*, 39 How. Prac. (N. Y.) 41.

⁴ *Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, 31 Am. St. 237; *Guy v. Duprey*, 16 Cal. 196; *Bent v. Barnett*, 95 Ky. 499, 26 S. W. 537.

⁵ Made under an invalid order of probate Court. *Waldermeyer v. Loebig*, 183 Mo. 363, 81 S. W. 904. Valid on building alone. *Weathersby v. Sinclair*, 43 Miss. 189.

⁶ *Seibel v. Bath*, 5 Wyo. 409, 40 Pac. 756; *McCormack v. Butland*, 191 Mass. 424, 77 N. E. 761; *Clark v. North*, 131 Wis. 599, 111 N. W. 681, 11 L. R. A. (N. S.) 764.

⁷ *Johnson v. Bennett*, 6 Colo. App. 362, 40 Pac. 847.

On dividing wall.—Plaintiff, when he builds a wall with consent of defendant on the dividing line between their lots, and the latter promises to pay half the cost when he shall use the wall, is not entitled to a mechanic's lien for one-half the cost on defendant's lot, on defendant's making use of the wall. *Swift v. Callan*, 103 Iowa 206, 71 N. W. 233.

⁸ *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *Davis v. Maysville Creamery Assn.*, 63 Mo. App. 477, 2 Mo. App. Rep'r 847.

⁹ *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806; *Blake v. Pitcher*, 46 Md. 453; *Ore-*

thority as to the amount that was to be contracted for.¹⁰ But generally the authority of the agent or its extent is not presumed. If he goes beyond what is usually known as the scope of his authority the right to a lien fails.¹¹ A partner, as incident to the partnership, has sufficient authority to make a contract that will bind the partnership and support a lien on the partnership property.¹² A lease holder is not by virtue of that fact invested with sufficient authority,¹³ and a tenant in common cannot bind the interest of his co-tenant.¹⁴ It must be shown that the authority existed at the time the contract

gon Lumber Co. v. Beckleen, 130 Iowa 42, 106 N. W. 260.

School committee.—A lien exists, under St. 1855, c. 431 for work done in enlarging a school house under a written contract with a building committee, chosen by the district with authority to make the enlargement, although by the terms of the contract the committee were personally responsible therefor; and it is immaterial whether the acts of the committee were subsequently ratified by the district at a legal meeting. *Morse v. School Dist. No. 7*, 3 Allen (Mass.) 307.

Owner or agent.—The owner of three lots and a building contractor agreed that the contractor should buy the lots on credit, a vendor's lien being reserved, and should erect on one of the lots a building according to a plan previously made for the owner, the other two lots to be used to obtain material; that when the building was completed the contractor should sell it, and pay the expense of the building and the price of the lots, the surplus to be his profits. The owner was

to advance money needed to further the enterprise. The builder, in contracting with material men and mechanics, was the owner's agent, within Mill & V. Code, 2739 (Shannon's Code, 3531), giving a lien on land on which any house has been built, by special contract with the owner or his agent. *Jonte v. Gill* (Tenn. Ch. App.), 39 S. W. 750.

¹⁰ *Paine v. Tillinghast*, 52 Conn. 532.

¹¹ If the contract is made with an agent, the right to a lien depends upon the scope of the agency. *Greene v. McDonald*, *Burton & Sowles*, 70 Vt. 372.

¹² *Smith v. Johnson*, 2 MacArthur (D. C.) 481; *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532; *Real Estate & Improvement Co. of Baltimore v. Phillips*, 90 Md. 515, 45 Atl. 174; *Hoagland v. Lusk*, 33 Neb. 376, 50 N. W. 162, 29 Am. St. 485; *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277.

¹³ *Gates v. Fredericks* (Ariz.) 52 Pac. 1118.

¹⁴ *Leslie v. Leonard*, 10 Pa. Super. Ct. (Pa.) 548.

was entered into.¹⁵ However, if a contract leasing the premises stipulates that certain improvements shall be put up, then proper authority is presumed.¹⁶ An executory contract of sale will not give to a prospective purchaser sufficient authority to bind the seller.¹⁷ The same rule applies here as in the case of leases. If the purchaser is in possession with an agreement that the owner will pay for the buildings and repairs, he has authority sufficient to bind the seller.¹⁷ Written authority establishing the agency is not necessary unless the statute so provides.¹⁸

§ 31. **Contract—Authority to make (continued).**—In all cases the material man or laborer must at his peril find out the authority of the agent, but if the owner holds out a person as having the proper authority, he is estopped from asserting to the contrary.¹⁹ If, however, the agent contracts on his own credit this will show that there is no intention to charge the building and no lien can be taken upon such contract.²⁰ And so it has been held that if a person is furnished with funds to pay for material purchased there is no authority to make a contract that will give a lien, binding the owner. This will probably be true only where the material man had knowledge that the agent was not an owner.²¹ The relation of

¹⁵ *Rass v. Sebastian*, 160 Ill. 602, 43 N. E. 708.

¹⁶ See §§ 27-29. *Kremer v. Walton*, 16 Wash. 139, 47 Pac. 238.

¹⁷ *Moore v. McLaughlin*, 42 N. Y. Supp. 256, 11 App. Div. 477; *Vosseller v. Slater*, 163 N. Y. 564, 57 N. E. 1127; *Perkins v. Blair*, 22 R. I. 334, 47 Atl. 883. See §§ 18 & 19.

^{17a} *Moore v. Jackson*, 49 Cal. 109; *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989.

¹⁸ *American Brick & Tile Co. v.*

Drinkhouse (N. J., Err. & App.), 58 N. J. L. 432, 36 Atl. 1034.

¹⁹ *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.*, 151 U. S. 447, 14 Super. Ct. 384, 38 L. Ed. 229; *Hough v. Collins*, 70 Ill. App. 661. See Dec. & Am. Dig. tit. Mechanics' Liens, § 72.

²⁰ *Rothe v. Bellingrath*, 71 Ala. 55.

²¹ *Proctor v. Tows*, 115 Ill. 138.

Authority by Court.—Authority granted by decree of court to one of a class of certain remaindermen to act as their agent in su-

husband and wife sometimes raises a question as to the authority of the one to make contracts that will bind the other. No authority from the wife to the husband will be presumed merely from the fact that they are husband and wife.²² Neither will the fact of her knowledge of the improvement raise a presumption that he acts by authority from his wife.²³ If the husband acts for himself, of course there can be no presumed authority.²⁴ But if the wife assumes to act and recognizes his authority, as for instance

perintending the building of a hotel on the property, and to apply sums to be realized from certain mortgages thereon in payment of its construction, does not give such agent the right to contract, so as to subject the property to a mechanic's lien. *Rudd v. Littell*, 30 Ky. 158, 45 S. W. 451.

²² *Indiana*.—*Johnson v. Tutewiler*, 35 Ind. 353.

Iowa.—*James v. Dalbey*, 107 Iowa 463, 78 N. W. 51.

Missouri.—*Fatham & Miller Planing Mill Co. v. Christopel*, 60 Mo. App. 106; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Garnett v. Berry*, 3 Mo. App. 197; *Meyer v. Broadwell*, 83 Mo. 571.

Nebraska.—*Rust-Owen Lumber Co. v. Holt*, 60 Neb. 82, 82 N. W. 112.

New York.—*Copley v. O'Neil*, 39 How. Prac. (N. Y.) 41.

Texas.—*Blevins v. Cameron*, 2 Posey, Unrep. Cas. (Tex.) 461, against her protest.

Alabama.—*McGeever v. S. H. Harris & Sons*, 148 Ala. 503, 41 So. 930; *Saunders v. Tuscumbia Roofing & Plumbing Co.*, 148 Ala. 519, 41 So. 982.

Iowa.—*Mineah v. Stotts*, 130 Iowa 530, 107 N. W. 425; *Cross v. Stott*, 130 Iowa 530; *Peterson v. Stott*, 130 Iowa 530.

Michigan.—*Bauer v. Long*, 147 Mich. 351, 110 N. W. 1059, 13 Detroit Leg. N. 1018.

Utah.—*Morrison v. Clark*, 20 Utah 432, 59 Pac. 235.

²³ *Missouri*.—*Kline v. Perry*, 51 Mo. App. 422.

Nebraska.—*Rust-Owen Lumber Co. v. Holt*, 60 Neb. 82, 82 N. W. 112; *Bradford v. Higgins*, 31 Nebr. 192, 47 N. W. 749.

Oklahoma.—*Block v. Pearson*, Okla. 91 Pac. 714.

Texas.—*Blevins v. Cameron*, 2 Posey, Unrep. Cas. (Tex.) 461.

Wisconsin.—*Corsen v. Ziehl*, 103 Wis. 381, 386, 79 N. W. 562. See § 38.

²⁴ *Michigan*.—*Hall v. Erkftiz*, 125 Mich. 332, 84 N. W. 310, 7 Detroit Leg. N. 524.

Missouri.—*Alexander v. Perkins*, 71 Mo. App. 286.

Nebraska.—*Rust-Owen Lumber Co. v. Holt*, 60 Neb. 82, 82 N. W. 112, citing all other Nebraska authorities, on subject of liens.

Pennsylvania.—*Miller v. Anne*, 17 Lanc. Law Rev. (Pa. Com. Pl.) 312.

by making payments to the material man,²⁵ or representing that her husband is her agent,²⁶ or it is shown that he acts with her consent,²⁷ or that she is in fraudulent collusion with her husband,²⁸ or she ratifies the contract,²⁹ authority to contract will be presumed. But the fact that he furnishes some of the money or the lot will not be sufficient.³⁰ If the authority is shown, the lien will not fail because he has exceeded his authority as to the amount of expenditure.³¹ Neither will the fact that credit was given to the husband alone defeat the lien if authority is otherwise shown.³² Where the statute gives the husband authority to contract,³³ or makes him trustee for his wife, then her property will be bound.³⁴ Where she is under such disability that she cannot bind her estate by her own contracts, then she can not give authority to her husband to make a binding contract.³⁵ In states that

Tennessee.—*Baker v. Stone* (Tenn. Ch. App.), 58 S. W. 761.

Illinois.—*McNichols v. Kettner*, 22 Ill. App. 493.

Maryland.—*Rimmey v. Getteman*, 63 Md. 424.

Massachusetts. — *Wheaton v. Trimble*, 145 Mass. 345, 14 N. E. 104, 1 Am. St. 463; *Gerry v. Howe*, 130 Mass. 347.

Michigan.—*Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034, 8 Detroit Leg. N. 458.

Nebraska.—*Bradford v. Peterson*, 30 Neb. 96, 46 N. W. 220; *Howell v. Hathaway*, 28 Neb. 807, 44 N. W. 1136.

Oklahoma.—*Limerick v. Ketcham*, 17 Okla. 532, 87 Pac. 605.

Illinois.—*Interstate Building & Loan Ass'n v. Ayers*, 71 Ill. App. 529; *Prendergast v. McNally*, 76 Ill. App. 335.

Indiana.—*Thompson v. Shepard*, 85 Ind. 352.

Missouri.—*Fischer v. Anslyn*, 30 Mo. App. 316.

Pennsylvania. — *Forrester v. Preston*, 2 Pittsburg. R. (Pa.) 298.

²⁷ *Bevan v. Thackara*, 143 Pa. 182, 22 Atl. 873, 28 W. N. C. 473, 24 Am. St. 529.

²⁸ *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034, 8 Detroit Leg. N. 458.

²⁹ *Interstate Building & Loan Association v. Ayers*, 177 Ill. 9, 52 N. E. 342; *Morrison v. Clark*, 20 Utah 432, 59 Pac. 235.

³⁰ *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034, 8 Detroit Leg. N. 458; *Duross v. Broderick*, 78 Mo. App. Rep'r, 223.

³¹ *Jones v. Pothast*, 72 Ind. 158.

³² *Kidd v. Wilson*, 23 Iowa, 464.

³³ *Bethell v. Chicago Lumber Co.*, 39 Kan. 230, 17 Pac. 813.

³⁴ *Ex Parte Schmidt*, 62 Ala. 252.

³⁵ *Pell v. Cole*, 59 Ky. (2 Metc.) 252.

recognize community property, the husband has authority to make a binding contract.³⁶ In enforcing the lien the petition must show acts that will bind the wife by estoppel, or agency, in order that the lien may be established.³⁷ The question of agency is a question of fact to be decided by the jury from a preponderance of the evidence.³⁸ If the statute requires the contract to be in writing this must be shown or the wife will not be bound. A receiver has no authority to subject the property to a lien.³⁹

§ 32. **Sufficiency of contract.**—As the contract between the owner and contractor is the basis of the lien, it must be one that is sufficient in law before it can be held to be a basis for the legal establishment of a lien. If the statute puts any formalities around its execution, these formalities must be observed, otherwise the usual rules applying to the legality of contracts will be applied. Thus, if the contract is barred by the statute of limitations,¹ or is void under the statute of frauds,² or is for material furnished, knowingly, for an illegal structure,³ there will be no lien; but it is generally held that to defeat a furnisher of material for an illegal purpose or structure, the furnisher must be a *particeps criminis* with the owner.⁴ If the contract has in any manner been extinguished or fully satisfied, the basis for the lien is gone.⁵ In all instances

³⁶ *Hard v. Owens* (Tex. Civ. App.), 48 S. W. 200.

³⁷ *Wilson v. Schuck*, 5 Ill. App. 572; *Wilson v. Smith*, 2 Leg. Rec. (Pa.) 368; *Martine v. Nelson*, 51 Ill. 422.

³⁸ *A. M. Becker Lumber Co. v. Stevens*, 84 Mo. App. 558; *Jones v. Walker*, 83 N. Y. 612.

³⁹ *Rowley v. Varnum*, 15 Okla. 612, 84 Pac. 487; *Tenth Nat. Bank v. Smith Const. Co.*, 218 Pa. 584, 67 Atl. 874.

¹ *Yeates v. Weeden*, 6 Bush. (Ky.) 39; *Vandiver v. Hodge*, 4

Bush. (Ky.) 538; *Hills v. Halliwell*, 50 Conn. 270. See Dec. & Am. Dig. tit *Mechanics' Liens*, § 73.

² *Birchell v. Neaster*, 36 Ohio St. 331.

³ *Spurgeon v. McElwain*, 6 Ohio 444; *Dorsey v. Langworthy*, 3 Iowa 341.

⁴ *Bishop v. Honey*, 34 Tex. 248.

⁵ *Wooten v. Archer*, 49 Ga. 388; *Wilkie v. Bray*, 71 N. Car. 205; *Nolan v. Gardner*, 4 E. D. Smith (N. Y.) 727; *Hoyt v. Miner*, 7 Hill. (N. Y.) 525.

the contract itself must rest upon a valid consideration.⁶ Whether or not the contract is valid will depend upon the facts existing at the time the work was begun.⁷ If the contract was then valid and subsequently modified, but not so as to affect its validity, it may still be held to be the basis of a lien.⁸ It should be sufficiently definite to enable the amount to be determined with reasonable accuracy and precision.⁹ And it must be such a contract that if it stood alone it would support an action at law.¹⁰ All claiming or working under the contract are bound by its terms.¹¹ The fact that the articles or work are furnished at various times will not destroy the entirety of the contract.¹² An early decision of the Massachusetts court holds that it must be an express contract,¹³ but this is not a general rule, it may be es-

⁶ Masow v. Fife, 10 Wash. 528, 39 Pac. 140.

⁷ Vanderpoel v. Knight, 102 Ill. App. 596.

⁸ Winkle Terra Cotta Co. v. Galena Safety Vault & Trust Co., 64 Ill. App. 184; Concord Apartment House Co. v. O'Brien, 228 Ill. 476, 81 N. E. 1076, affirming 128 Ill. App. 437.

⁹ Wilder v. French, 9 Gray (Mass.) 393; Manchester v. Searle, 121 Mass. 418. The statute provides, among other things, "that any person to whom money shall be due for labor expended in the erection or repair of a building and the lot of land on which it stands shall have a lien for his security, to an amount not exceeding the amount of the contract. This plainly shows that the contract under which a lien may arise, must be of such a character, and upon such terms and stipulations between the par-

ties, that the amount may be ascertained and determined with precision and certainty. Wilder v. French, 75 Mass. 395; Joseph N. Elsendrath Co. v. Gebhardt, 124 Ill. App. 325, decree affirmed 222 Ill. 113, 78 N. E. 22; Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103, modifying judgment 126 Ill. App. 337; Provost v. Shirk, 223 Ill. 468; 79 N. E. 178.

¹⁰ Loonie v. Hogan, 9 N. Y. 435; Concord Apartment House Co. v. O'Brien, 228 Ill. 476, 128 Ill. App. 437, decree affirmed, 81 N. E. 1076.

¹¹ Grane v. Genin, 60 N. Y. 127; Ferguson v. Stephenson-Brown Lumber Co., 14 Okla. 148, 77 Pac. 184; O'Driscoll v. Bradford, 171 Mass. 231, 50 N. E., 628.

¹² Milner v. Norris, 13 Minn. 455.

¹³ Parker v. Anthony, 70 Mass. (Gray) 289.

established from circumstances the same as other implied contracts.¹⁴ Unless the statute expressly so provides, it is immaterial where the contract is made,¹⁵ so long as the materials are furnished in the state where the building is located.¹⁶ Where the statute makes the plans and specifications an essential element of the work such specifications must be set forth, or attached.¹⁷ Where the contract is founded on a single consideration and parts of the work or material are subject to a lien and others are not, as a general rule such a contract will not furnish the basis for a lien.¹⁸ But if the amount of what might be termed the lienable part can be ascertained, such part will furnish a basis for a lien.¹⁹ This applies where the work or building is on different tracts of land,²⁰ unless the different tracts of land belong to different persons, some of whom are not parties to the contract.²¹ If, however,

¹⁴ See § 35, et seq.

¹⁵ *Gaty v. Casey*, 15 Ill. (5 Peck) 189; *United States Inv. Co. v. Phelps & Bigelow Windmill Co.*, 54 Kan. 144, 37 Pac. 982; *Atkins v. Little*, 17 Minn. 342 (Gil. 320); *Fagan v. Boyle Mach. Co.*, 65 Tex. 324.

¹⁶ *Campbell v. Coon*, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410; see § 3.

¹⁷ *California*.—*Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Worden v. Hammond*, 57 Cal. 61; *California Iron Const. Co. v. Bradbury*, 138 Cal. 328, 71 Pac. 346.

Pennsylvania.—*Short Wade v. Cole*, 31 Pittsb. (Pa.) 409; *Montello Brick Works v. Hoot*, 19 Montg. (Pa.) 188.

¹⁸ *Illinois*.—*Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 18 N. E. 809.

Massachusetts.—*Donaher v. City of Boston*, 126 Mass. 309; *Mulrey v. Barrow*, 93 Mass. (11

Allen) 152; *Graves v. Bemis*, 90 Mass. (8 Allen) 573; *Morrison v. Minot*, 87 Mass. (5 Allen) 403.

¹⁹ *Felton v. Minot*, 89 Mass. (7 Allen) 412.

²⁰ See § 134. *Foster v. Cox*, 123 Mass. 45.

Plaintiff agreed to sell defendant a vacant lot, and to build her a house thereon. Both agreements were written on the same paper, but the consideration for each was separate, and payable at different times. Plaintiff built the house, and then gave defendant a deed of the property. As the agreements were severable, the plaintiff was entitled to a mechanic's lien on the property for the amount due him for building the house. *Fuller v. Proust*, 155 Pa. 275, 26 Atl. 543, 55 Am. St. 881.

²¹ *McGuinness v. Boyle*, 123 Mass. 570, 25 Am. Rep. 123.

it can be ascertained with certainty what part was applied to the land of the owner who entered into the contract, the lien will apply to that part.²² In some states the contracts of married women relative to homesteads and their separate property, rest upon different foundations from other contracts. Generally, however, such contracts now rest for their sufficiency upon the same foundation as other contracts.²³ It is not always necessary to show that she makes the contract with the idea of charging her separate estate.²⁴ Where the common law is still in force, though in a modified form, it is sometimes necessary to allege that the improvement was a necessary one.²⁵ If she has no capacity to make the contract or does not in fact make one, equity will not charge her estate, even though the claim has been paid by another.²⁶ Having power to contract she will be held the same as any other contractor.²⁷ Statutory requirements of the state where made will govern as to consent,²⁸ on a homestead,²⁹ the signing,³⁰

²² *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

²³ **Contracts of married women.**

—"While courts should carefully protect married women in the enjoyment of their separate property and not permit it to be unjustly charged with an encumbrance, yet they should not be permitted to enhance the value of their property at the expense of an innocent and confiding creditor. If the materials were furnished and used in the improvement of her property by her directions or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials." *Einstein v. Jamison*, 95 Pa. 403.

²⁴ *Shilling v. Templeton*, 66 Ind. 585.

²⁵ *Einstein v. Jamison*, 95 Pa. 403.

²⁶ *McFarlane v. Southern Lumber & Supply Co.*, 47 Fla. 271, 36 So. 1029. If the husband makes contract on his own credit she is not bound. *Ziegler v. Galvin*, 45 Hun (N. Y.) 44.

²⁷ *Chicago Lumber Co. v. Mahan*, 53 Mo. App. 425; *St. Clair Bldg. Assn. v. Hayes*, 2 Ohio Cir. Ct. R. 225, 1 Cir. Dec. 456.

²⁸ Actual knowledge will be sufficient. *Husted v. Mathes*, 77 N. Y. 388.

²⁹ *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278, 788; *Taylor v. Huck*, 65 Tex. 238.

³⁰ Where the statute requires the contract to be signed, it is sufficient if signed by the reputed

and the authentication,⁸¹ which must be followed or the validity of the contract is impaired.

§ 33. **Contract, necessity for written.**—The contract should not be confused with the lien itself, for while the contract is a legal incident to the lien it is not the lien and unless the statute so requires, need not be in writing.¹ However, if the statute does require that the contract should be in writing there can be no lien when the contract is not evidenced in that manner.² The contract that is required to be in writing is the contract providing for the building or improvement. A contract to convey land, is not such a contract,³ nor is the estimate of the building,⁴ nor a promissory note given after the work is done.⁵ If the contract for material is changed verbally, as where a written contract to build a house was changed to build a barn, it loses its character as a contract in writing.⁶ In Kentucky before a lien can attach on a homestead the right must be waived in writing, subscribed by the owner and his wife and acknowledged and recorded in the same manner as a deed.⁷ So in

owner. *Dunlop v. Kennedy*, 102 Cal. 443, 34 Pac. 92; *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896.

³¹ *Pope v. Graham*, 44 Tex. 196; *Bosley v. Pease* (Tex. Civ. App.), 22 S. W. 516. Acknowledged by wife. *Heady v. Bexar Building & Loan Assn.* (Tex. Civ. App.), 26 S. W. 468.

¹ *Iowa*—*Cotes v. Shorey*, 8 Iowa 416.

Kentucky.—*Jefferson v. Hopson Bros.* 27 Ky. Law 140, 84 S. W. 540.

Massachusetts. — *Whitford v. Newell*, 84 Mass. (2 Allen), 424.

Mississippi.—*Harrison v. Breden*, 8 Miss. 670.

Texas.—*State v. Cherokee Iron Mfg. Co.*, 2 Tex. Civ. App. 588, 22 S. W. 253.

Virginia.—*Merchants' & Me-*

chanics' Sav. Bank v. Dashiell, 25 Grat. (Va.) 616.

See Dec. & Am. Dig. tit. *Mechanics' Liens*, § 73.

² *Murphy v. Hussa* (N. J. Sup.), 57 Atl. 388; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Associates of Jersey County v. Davison*, 29 N. J. Law 415; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Haswell v. Goodchild*, 12 Wend. (N. Y.) 373.

³ *National Bank of Metropolis v. Sprague*, 10 N. J. Eq. 13.

⁴ *Murphy v. Cicero Lumber Co.*, 97 Ill. App. 510.

⁵ *Taylor v. Huck*, 65 Tex. 238; *Reece v. Corlew*, 60 Tex. 70.

⁶ *Reiss v. Scherner*, 87 Ill. App. 84.

⁷ *Roberts v. Riggs*, 84 Ky. 251, 1 S. W. 431; *Sternbergen v. Gow-*

Texas it must be in writing and recorded within 30 days after its execution.⁸ In Alabama the husband must consent in writing;¹⁰ In Kentucky though the contract formerly was required to be in writing,¹¹ it is not so under the present statute.¹² The same is true of Rhode Island.¹³ In California where the contract price is more than \$1,000 it must be stated in the written contract.¹⁴ In Louisiana, the contract must be in writing and recorded, if the price exceeds \$500.¹⁵ If a written contract is required it must describe the land on which the improvement is to be made;¹⁶ otherwise if not required to be

dy, 93 Ky. 146, 19 S. W. 186. Under the constitution of Michigan, the homestead can only be reached by a foreclosure of a mortgage. *Burtch v. McGibbon*, 98 Mich. 139, 56 N. W. 1110.

⁸ *Huff v. Clark*, 59 Tex. 347; *Barnes v. White*, 53 Tex. 628; *Campbell v. Fields*, 35 Tex. 751; *Interstate Building & Loan Assn. v. Goforth*, 94 Tex. 259, 59 S. W. 871; *Lippencott v. York*, 86 Tex. 276, 24 S. W. 275.

¹⁰ *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Wadsworth v. Hodge*, 88 Ala. 500, 7 So. 194.

¹¹ *Webster v. Tattershall*, 18 Ky. Law 439, 36 S. W. 1126; *Passmore v. Eastin's admr.*, 90 Ky. 380, 14 S. W. 356.

¹² *Johnson v. Bush*, 23 Ky. Law 1399, 65 S. W. 158; *Spillman v. Gaines*, 13 Ky. Law 328.

¹³ *Cameron v. McCullough*, 11 R. I. 173; *Briggs v. Titus*, 7 R. I. 441; *Bliss v. Patten*, 5 R. I. 376.

¹⁴ *Sidlinger v. Kerkow*, 82 Cal. 42, 22 Pac. 932; *Barber v. Reynolds*, 33 Cal. 497.

¹⁵ Does not apply to sidewalk. *Oddie v. His Creditors*, 6 Mart. (La. N. S.) 473; *Taylor v. Crain's*

adm., 16 La. 290; *Lacoste v. West*, 19 La. Ann. 446; *McRae v. His Creditors*, 16 La. Ann. 305; *First Municipality v. Hall*, 2 La. Ann. 549. As applied to third persons. *Murray v. Sweeney*, 48 La. Ann. 760, 19 So. 753.

¹⁶ *Burkhart v. Reisig*, 24 Ill. 530.

Sufficient description.—A contract to furnish materials for a mill at Marseilles, if it does not appear that the defendant has more than one mill at that place, will be a sufficiently definite description of property to authorize the creation of a mechanic's lien. *Strawn v. Cogswell*, 28 Ill. 457.

None specified.—Where a contract to erect a building designates no particular place for the building, and the building is afterwards erected on premises occupied at the time and prior thereto as a homestead, the contract cannot form the basis on which to establish a mechanic's lien on such homestead. *Hammond v. Wells*, 45 Mich. 11, 7 N. W. 218.

in writing.¹⁷ The description is sufficient if there is enough to identify the property.¹⁸ It has been held enough to set out the name of the house.¹⁹ In such matters the law should not be construed too rigidly.²⁰ If part is correctly described and part not, the lien will be good as to the part correctly described.²¹ A recital that the work is to be done on a frame building has been held sufficient where the statute requires the written contract to describe the building;²² but that it is to be in accordance with plans, to be kept and remain in the architect's office, has been held not to be in the written contract.²³ Recital in one case that the work was to be done on an 18-room, two-story, frame house, on lots 2 and 3, in block 121, Oak Cliffs, Dallas County, Texas,²⁴ and in another on Avenue E. just north of the U. S. Post Office, San Antonio, Texas, have been held sufficient.²⁵ Every item contemplated to be furnished need not be specifically named in the contract.^{25a} It should however, state the price agreed upon,²⁶ so as to show a definite undertaking contemplated at the outset.²⁷ Where a landlord is made liable for improvements put upon his prem-

¹⁷ *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *San Diego Lumber Co. v. Woolredge*, 90 Cal. 574, 27 Pac. 431.

¹⁸ *Myers v. Maverick* (Tex. Civ. App.), 27 S. W. 951; *Houston v. Myers*, 88 Tex. 126, 30 S. W. 912; *Myers v. Maverick* (Tex. Civ. App.), 27 S. W. 950.

¹⁹ *Powers Lumber Co. v. Wade*, 15 Tex. Civ. App. 295, 39 S. W. 158; *Jossman v. Rice*, 121 Mich. 270, 80 N. W. 25.

²⁰ *Barnes v. Thompson*, 32 Tenn. 313; *D. June & Co. v. Doke*, 35 Tex. Civ. App. 240, 80 S. W. 402.

²¹ *Clark v. Manning*, 90 Ill. 380.

²² *Blyth v. Torre* (Cal.), 38 Pac.

639; *Butterworth v. Levy*, 104 Cal. 506, 38 Pac. 897.

²³ *Butterworth v. Levy*, 104 Cal. 506, 38 Pac. 897.

²⁴ *Collier v. Betterton*, 8 Tex. Civ. App. 479, 29 S. W. 490.

²⁵ *Myers v. Maverick* (Tex. Civ. App.), 27 S. W. 1083.

^{25a} *Jones v. Swan*, 21 Iowa 181.

²⁶ *Sanderson v. Taft*, 72 Mass. (6 Gray) 533; *Wilder v. French*, 75 Mass. (9 Gray) 393; *Manchester v. Searle*, 121 Mass. 418.

²⁷ Not furnishing articles from time to time in the regular course of business. *Tatum v. Cherry*, 12 Ore. 135, 6 Pac. 715. But where the work is ordered for a building, the law raises a promise to pay for it, and so there

ises and the statute requires that his consent thereto be in writing, a written consent that the tenant make repairs at his own expense is insufficient.²⁸ The lease in such cases must be in writing.²⁹

§ 34. **Contract—Terms and times of payment.**—Unless required by statute it is not necessary for the contract to state the terms and times of payment.¹ The law implies that payment shall be made when work is completed.² When the statute requires a statement of that kind, it must show the time set for the completion of the work;³ and if the contract fixes the time of payment beyond the time limited by law for the enforcement of the lien, no lien can be had.⁴ If the statute requires that the contract state both the time in which it is to be completed and the money to be paid, there can be no lien without such statement.⁵ A contract is sufficiently certain as

is a complete contract between the parties. *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544.

²⁸ *Hervey v. Gray*, 42 N. J. L. 168.

²⁹ *Mosher v. Lewis* (Com. Pl. N. Y.), 10 Misc. 373, 31 N. Y. Supp. 433. An agreement that the repairs shall be left on the property, is sufficient consideration to support a lien on consent of the owner. *Hankinson v. Riker* (Com. Pl. N. Y.), 10 Misc. 185, 30 N. Y. Supp. 1040.

¹ *Foerder v. Wesner*, 56 Iowa 157, 9 N. W. 100; *O'Brien v. Hanson*, 9 Mo. App. 545; *Collier v. Betterton*, 8 Tex. Civ. App. 479, 29 S. W. 490.

² *Bolter v. Kozlowski*, 211 Ill. 79, 71 N. E. 858; *Claycomb v. Cecil*, 27 Ill. 497; *Burkhart v. Reisig*, 24 Ill. 529; *Mix v. Ely*, 2 G. Greene (Iowa), 513.

³ *Murphy v. Cicero Lumber Co.*,

97 Ill. App. 510; *King v. Lamon*, 193 Ill. 537, 61 N. E. 1074; *Kelly v. Northern Trust Co.*, 190 Ill. 401; *Freeman v. Rinaker*, 185 Ill. 172.

⁴ *Hardin v. Marble*, 76 Ky. (13 Bush.) 58.

⁵ *California*.—*Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150.

Illinois.—*Curran v. Webbe*, 97 Ill. App. 525; *Roulet v. Hogan*, 203 Ill. 525, 68 N. E. 97; *Henry v. Applegate*, 111 Ill. App. 13; *Bolter v. Koslowski*, 112 Ill. App. 13.

When a contract is sufficient to authorize a lien.—A contract for a heating plant which provides that the contractor shall "put the job in condition to fire upon or before the 25th day of October, 1897, and shall not be required to do any more work after that date on said job until the payment of \$1,000, and the payment of the balance of the contract price is satisfactorily secured,"

to time where it provides for payment on demand,⁶ or upon a written order at the end of every week;⁷ or for "final payment to be made within 30 days after completion of the work."⁸ Days of grace will not be considered as extending the time beyond the period limited.⁹ The contract price need not necessarily be money,¹⁰ but may be land at a certain figure,¹¹ or shares in a corporation.¹² In such cases, before the lien can be foreclosed and the amount recovered in money, it is necessary to show that the defendant refuses to pay in the manner provided,¹³ or that the contract is unenforceable.¹⁴ So if the statute makes the time at which the services are to be rendered an essential element of the right to a lien, and no time is

is sufficient to authorize the allowance of a mechanic's lien for the \$1,000 specified. *Roulet v. Hogan*, 203 Ill. 525.

⁶ *Blackman v. Marsicano*, 61 Cal. 638; *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

⁷ *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

⁸ *Dunlop v. Kennedy*, 102 Cal. 443, 34 Pac. 92; *San Diego Lumber Co. v. Woolredge*, 90 Cal. 574, 27 Pac. 431. Where old building is taken in part payment, did not invalidate contract. *California Iron Const. Co. v. Bradbury*, 138 Cal. 328, 71 Pac. 346. But not in more than 35 days after work, as no lien can be filed after that time. *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111. If more than one year, lien cannot be filed after that time. *Beasley v. Webster*, 64 Ill. 458; *Chisholm v. Randolph*, 21 Ill. App. 312; *Simon v. Blocks*, 16 Ill. App. 450.

⁹ *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Stout v. Sower*, 22 Ill. App. 65; *Hutchins v. Bautch*, 123 Wis. 394, 101 N. W. 671.

¹⁰ *Baird v. Peall*, 92 Cal. 235, 28 Pac. 285; *McLaughlin v. Reinhart*, 54 Md. 71; *Dowdney v. McCullom*, 59 N. Y. 367; *Pierce v. Marple*, 148 Pa. 69, 30 W. N. C. 31, 23 Atl. 1008, 33 Am. St. 808; *McMurray v. Brown*, 91 U. S. (1 Otto) 257, 23 L. ed. 321.

¹¹ *McMurray v. Brown*, 91 U. S. (1 Otto) 257, 23 L. ed. 321; *Reiley v. Ward*, 4 G. Greene (Iowa), 21; *Protection Ins. Co. v. Hall*, 54 Ky. (15 B. Mon.) 411.

¹² *Davis & Rankin Bldg. & Mfg. Co. v. Colusa Dairy Assn.*, 55 Ill. App. 591.

¹³ *McMurray v. Brown*, 91 U. S. 257, 23 L. ed. 321; *Reiley v. Ward*, 4 G. Greene (Iowa), 21; *Bitter v. Mouat Lumber & Investment Co.*, 10 Colo. App. 307, 51 Pac. 519; *Dowdney v. McCullom*, 59 N. Y. 367.

¹⁴ *Protection Ins. Co. v. Hall*, 54 Ky. (15 B. Mon.) 411.

stated for the work, there can be no lien.¹⁵ Performance within a reasonable time,^{15a} or when practicable,¹⁶ or as fast as ordered, is not sufficient.¹⁷ In Illinois if the contract is verbal and the work done within one year, the lien will lie.¹⁸ In a written contract the time is limited to three years.¹⁹

§ 35. **Contract—Express or implied—Estoppels.**—Notwithstanding the early view¹ that an express contract was indispensable, it is now thoroughly settled the lien may be based

¹⁵ *Illinois*.—*M. Prugh Co. v. Wallace*, 198 Ill. 422, 64 N. E. 1005; *Williams v. Rittenhouse & Embree Co.*, 198 Ill. 422, 64 N. E. 995; *Superior Lumber Co. v. Gottlieb*, 102 Ill. App. 392; *Adler v. World's Pastime Exposition Co.*, 26 Ill. App. 528; *Senior v. Brebnor*, 22 Ill. 252. In three years. *Reed v. Boyd*, 84 Ill. 66. And these essentials must be determined when contract is entered into. *Cook v. Heald*, 21 Ill. 425; *Cook v. Vreeland*, 21 Ill. 431; *Cooke v. Haungs*, 113 Ill. App. 501; *Smith v. Central Lumber Co.*, 113 Ill. App. 477.

^{15a} *Webbe v. Curran*, 198 Ill. 18, 64 N. E. 710; *Coburn v. Tyler*, 41 Ill. 354.

¹⁶ *Williams v. Rittenhouse & Embree Co.*, 198 Ill. 602, 64 N. E. 995.

¹⁷ *Powell v. Webber*, 79 Ill. 134; *Haines v. Chandler*, 26 Ill. App. 400. Under Illinois act, where contract is implied, and not time expressed for payment; a reasonable time cannot be implied. *Hindert v. American Trust & Savings Bank*, 100 Ill. App. 85. And no lien can be beyond one year from completion of work.

Clark v. Manning, 90 Ill. 380; *Grundeis v. Hartwell*, 90 Ill. 324; *George Green Lumber Co. v. Nuttriment Co.*, 133 Ill. App. 635; *Concord Apartment House Co. v. Von Platen*, 106 Ill. App. 40; *Harvey & Mose Plumbing Co. v. Wallace*, 99 Ill. App. 212; *Harwood v. Brownell*, 32 Ill. App. 347; *Younger v. Louks*, 7 Ill. App. 280; *Austin v. Wohler*, 5 Ill. App. 300; *Graham v. Meehan*, 4 Ill. App. 522.

¹⁸ *Illinois*.—*Hindert v. American Trust and Savings Bank*, 198 Ill. 538, 64 N. E. 1008; *Zuttermelster v. Central Lumber Co.*, 104 Ill. App. 120; *Harvey & Mose Plumbing Co. v. Wallace*, 99 Ill. App. 212; *Dymond v. Bruhns*, 200 Ill. 292, 65 N. E. 641; *Richardson v. Central Lumber Co.*, 105 Ill. App. 358; *Levinson v. Malloy*, 64 Ill. App. 425. Statute now does not require any particular kind of contract.

¹⁹ *Kelley v. Northern Trust Co.*, 190 Ill. 401, 60 N. E. 585; *M. J. Fitch Paper Co. v. McDonald*, 91 Ill. App. 543; *Vanderpoel v. Knight*, 102 Ill. App. 596; *Lamon v. King*, 91 Ill. App. 74.

¹ See § 25.

upon a contract either express or implied, unless the statute provides to the contrary.² It is not absolutely necessary that the contract should be made with the owner, it may be made by a person duly authorized.³ The mere fact that work as done on a building belonging to the person sought to be charged, is not sufficient.⁴ The owner must do something or fail to do something from which fact the contract, or the necessary consent, may be implied.⁵ If the builder abandons his contract and leaves material on the ground which the owner accepts and uses,⁶ or the owner adopts the contract as an entirety,⁷ or in some cases where consent is sufficient to bind him, if he knew the work was progressing, a lien may be obtained.⁸ But where the statute requires that a contract must

² *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806; *Cunningham v. Ferry*, 74 Ill. 426; *Carney v. Cook*, 80 Iowa, 747, 45 N. W. 919; *Sturges v. Green*, 27 Kan. 235. See Dec. & Am. Dig. tit. Mechanics' Liens § 75. Where the contractor employs necessary workmen, the consent of the owner to the work done is implied, so as to entitle such workmen to a lien. *Monaghan v. Goddard*, 173 Mass. 468, 53 N. E. 895; *Miller v. Neely*, 59 Neb. 539, 81 N. W. 443. Evidence that defendant, the owner of a house being erected by contractors, with whom plaintiff had negotiated relative to furnishing a furnace for the house, told plaintiff that he desired a more expensive furnace, and substantially promised to pay for it, to which arrangement the contractors consented, is sufficient to impose on the owner a personal obligation to pay for the furnace, which will sustain a mechanic's lien on the house. *Richardson*

& *Boynton Co. v. Reid*, 50 Hun (N. Y.) 606, 3 N. Y. Supp. 224; *Henderson v. Wasserman*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 151; *Tom Sweeney Hardware Co. v. Gardner*, 18 S. Dak. 166, 99 N. W. 1105.

Consent of owner.—*York v. Mathis*, 103 Me. 67, 68 Atl. 746.

³ See § 26. *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806.

⁴ *Stout v. McLachlin*, 38 Kan. 120, 15 Pac. 902.

⁵ *Eichler v. Warner*, 46 Misc. (N. Y.) 246, 91 N. Y. Supp. 793; *Nellis v. Bellinger*, 6 Hun (N. Y.) 560.

⁶ *Woolreich v. Fettretch*, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 326.

⁷ *Anderson v. Berg*, 174 Mass. 404, 54 N. E. 877.

⁸ *New York.*—*Fischer v. Jordan*, 169 N. Y. 615, 62 N. E. 1095; *Otis v. Dodds*, 90 N. Y. 336; *Steeves v. Sinclair*, 171 N. Y. 676, 64 N. E.

be made, mere knowledge is not a sufficient foundation for an implied contract.⁹ Where the statute makes the time in which the work is to be completed an essential, such time cannot be implied in determining whether or not the lien exists, but it must be expressed in the contract.¹⁰ The doctrine of estoppel applies to the contract, or consent necessary to make a valid contract, within the mechanic's lien law the same as in other matters, and when a man is silent when he ought to speak, equity will debar him from speaking when conscience and equity require him to be silent.¹¹ Therefore, if the owner stands by and sees work done on his land when he ought to speak and make any objections he may have, the necessary

1125; *Hurd v. Wing*, 93 App. Div. (N. Y.) 62, 86 N. Y. Supp. 907; *Rice v. Culver*, 57 App. Div. (N. Y.) 552, 68 N. Y. Supp. 24; *Steeves v. Sinclair*, 56 App. Div. (N. Y.) 448, 67 N. Y. Supp. 776; *Fischer v. Jordan*, 54 App. Div. (N. Y.) 621, 66 N. Y. Supp. 286. Where a purchaser of property on which buildings are being erected under contract, to her knowledge, does not have her deed recorded and gives no notice of her purchase, converses with the contractor, and gives directions concerning what she wants done, and keeps herself fully informed of the nature of the work and its execution, a finding that with knowledge of all the facts she consented to the performance of the work and thereby subjected herself to liability for the work done is authorized. *Gilmour v. Colcord*, 96 App. Div. (N. Y.) 358, 89 N. Y. Supp. 689.

⁹ *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 82 N. W. 112, 83 Am. St. 512n.

¹⁰ *Henry v. Applegate*, 111 Ill. App. 13; *Garden City Banking & Trust Co. v. Grabe*, 108 Ill. App. 453; *Pierce v. Barnes*, 106 Ill. App. 241; *Concord Apartment House Co. v. Von Platen*, 106 Ill. App. 40; *Ludwig v. Huverstuhl*, 108 Ill. App. 461; *Roulet v. Hogan*, 107 Ill. App. 164; *Rogers v. Concord Apartment House Co.* 93 Ill. App. 302.

¹¹ *Hanchey v. Hurley*, 129 Ala. 306, 30 So. 742; *Donaldson v. Holmes*, 23 Ill. 85, [83]. See Dec. & Am. Dig. tit Mechanics' Liens § 76. It is an ancient principle of equity that, where one of two persons must suffer from the act of a third, he must be the sufferer who puts it in the power of a third to inflict the injury. From this principle has sprung the well-established rule that one may not stand by without objection and see another in good faith improve and enhance the value of his property, and then hold onto such benefits without paying for them. *Lengelsen v. McGregor*, 162 Ind.

contract or consent will be implied.¹² And this principle will apply, whether he was a party to the original contract, or not.¹³ The knowledge or acts to establish an implied contract must be personal knowledge or acts of the owner.¹⁴ The knowledge of the parent cannot be imputed to a minor,¹⁵ nor of the husband to the wife,¹⁶ nor of a director to his corporation.¹⁷ But the knowledge of the president of a corporation is that of the corporation.¹⁸

§ 36. Contract—express or implied—improvements.—The knowledge of the owner will not avail the contractor, unless

258, 67 N. E. 524, 70 N. E. 248; *Phillips v. Clark*, 61 Ky. (4 Metc.) 348, 83 Am. Dec. 471. Notice to manager of corporation is notice to corporation. *Stearns-Rogers Mfg. Co. v. Aztec Gold Min. Co.*, —New Mex.—, 93 Pac. 706.

¹² *Donaldson v. Holmes*, 23 Ill. 85, [83]. *Willverding v. Offineer*, 87 Iowa 475, 54 N. W. 592; *Evans v. Cunningham*, 6 Pa. Co. Ct. 156. Where a father and adult son both lived in the father's house, and the father saw repairs made under the son's direction, the father could not defend against a claim of lien. *Cannon v. Helfrick*, 99 Ind. 164. Evidence that the owner of property was present at the making of a contract to construct an improvement on the property, and almost constantly during the work, and that the money to pay for the construction was raised by a mortgage on the property, shows her consent to the work, as required by the mechanics' lien law. *Brunold v. Glasser*, 25 Misc. (N. Y.) 285, 53 N. Y. Supp. 1021.

¹³ *Hellwig v. Blumenberg*, 55 Hun. (N. Y.) 605, 7 N. Y. Supp. 746; *Marshall v. Cohen*, 11 Misc. (N. Y.) 397, 32 N. Y. Supp. 283; *National Wall-Paper Co. v. Sire*, 163 N. Y. 122, 57 N. E. 293, 7 N. Y. Ann. Cas. 406; *Cowen v. Paddock*, 137 N. Y. 188, 33 N. E. 154; *Miller v. Mead*, 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701n.

¹⁴ *Shaw v. Young*, 87 Me. 271, 32 Atl. 897. Consent of the survivor of a board of unincorporated trustees of a religious society, to the erection of a church on lands held by him in trust for the society, was not shown merely by proof that he lived within a quarter of a mile and in sight of the church, where he was upwards of 97 years of age, and had not acted in the affairs of the society for many years. *Peabody v. Eastern Methodist Soc.*, 87 Mass. (5 Allen) 540.

¹⁵ *Bliss v. Patten*, 5 R. I. 376.

¹⁶ *Peabody v. Eastern Methodist Soc.*, 87 Mass. (5 Allen) 540.

¹⁷ *Lothian v. Wood*, 55 Cal. 159.

¹⁸ *Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336.

the work is done on the faith and credit of the person having knowledge.¹ In order for the owner to be bound by improvements made by a purchaser he must so act as to make it inequitable for his property to go free.² Mere knowledge is not sufficient in such cases from which a contract may be implied.³ An owner who contracts to sell a building in process of erection, will be liable for improvements put in by a vendee to complete the building in the manner originally agreed upon.⁴ Where the statute does not require a contract, but mere consent, knowledge of the owner of the fact of the improvement will be sufficient from which the necessary consent may be implied.⁵ Where the necessary contract is implied, in order to hold the owner for improvements made by a lessee, unless the contract stipulates that the lessee is to erect certain build-

¹ *Des Moines Sav. Bank v. Goode*, 106 Iowa 568, 76 N. W. 825; *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569.

² *Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896.

³ *People's Savings, Loan, etc., Assn. v. Spears*, 115 Ind. 297, 17 N. E. 570; *Callaway v. Freeman*, 29 Ga. 408. Where vendors retained the deeds as security for the price, the fact that they were aware that a building was being constructed on the land, but had nothing to do with the contract for its erection, did not give a person the right to a lien on the property for labor performed on the building during the time the deeds were withheld, under Pub. St. c. 191, § 1, which provides that any person to whom a debt is due for labor performed by virtue of an agreement with, or by consent of, the owner, shall have a lien. *Courtemanche v. Blackstone Val. St. R. Co.*, 170 Mass.

50, 48 N. E. 937, 64 Am. St. 275; *Saunders v. Bennett*, 160 Mass. 48, 35 N. E. 111, 39 Am. St. 456.

⁴ *Weber v. Weatherby*, 34 Md. 656.

⁵ *Kealey v. Murray*, 15 N. Y. Supp. 403, 61 Hun (N. Y.) 619 (without opinion); *Husted v. Mathes*, 77 N. Y. 388; *Nellis v. Bellinger*, 6 Hun (N. Y.) 560; *Voseller v. Slater*, 25 App. Div. (N. Y.) 368, 49 N. Y. Supp. 478, contra; *Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 554. No authority from landlord. *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546. The facts from which the inference of a consent is to be drawn must be such as to indicate at least willingness on the part of the owner, to have the improvements made or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed. *Cowen v. Paddock*, 137 N. Y. 188, 33 N. E. 154; *Berger*

ings or make certain repairs, he will not be bound.⁶ The owner will not be bound if the lease stipulates that the tenant shall make repairs at his own cost. In such cases where it is sought to hold the owner's interest for improvements made by the tenant, the mechanic is bound by the terms of the lease.⁷ Knowledge that improvements are being made beyond the amount stipulated will not bind the landlord.⁹ If the lease requires that the landlord have a written notice, he can not be bound unless notice is given.¹⁰ The fact that the landlord is to re-imburse the tenant for repairs made is not sufficient to establish an implied consent or contract.¹¹ In no event can the landlord be held unless it is shown that the material or work went into the building.¹² If the tenant is authorized to make repairs at his own discretion,¹³ or of a specified kind,¹⁴ or having shown the plans to his landlord he is directed to "go

Mfg. Co. v. Zabriskie, 75 N. Y. Supp. 1038; *McCauley v. Hatfield*, 28 N. Y. Supp. 648, 59 N. Y. 552; *Belvin v. Raleigh Paper Co.*, 123 N. Car. 138, 31 S. E. 655; *Reed v. Estes*, 113 Tenn. 200, 80 S. W. 1086.

⁶ *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284, 68 Pac. 226.

⁷ *Illinois*.—*McRae v. Murdoch Campbell Co.*, 94 Ill. App. 105.

New Jersey.—*Hervey v. Gay*, 42 N. J. L. (13 Vroom.) 168.

New York.—*Berger Mfg. Co. v. Zabriskie*, 75 N. Y. Supp. 1038; *Sunshine v. Morgan*, 39 Misc. (N. Y.) 778, 81 N. Y. Supp. 278; *National Wall-Paper Co. v. Sire*, 37 App. Div. (N. Y.) 405, 55 N. Y. Supp. 1009, 7 N. Y. Ann. Cas. 406; *De Klyn v. Simpson*, 34 App. Div. (N. Y.) 436, 54 N. Y. Supp. 345. But a stipulation to make all repairs will not bind the owner for the tenant's repairs. *Berger*

Mfg. Co. v. Zabriskie, 75 N. Y. Supp. 1038.

⁹ *De Klyn v. Gould*, 165 N. Y. 232, 59 N. E. 95, 80 Am. St. 719, 31 Civ. Proc. (N. Y.) 223. Unless the statute provides that a consent is sufficient mere knowledge that the repairs are being done, will not bind the owner. *Jones v. Crumb*, 53 Hun (N. Y.) 631, 6 N. Y. Supp. 338.

¹⁰ *Berger Mfg. Co. v. Zabriskie*, 75 N. Y. Supp. 1038; *Hartley v. Murtha*, 36 App. Div. (N. Y.) 196, 56 N. Y. Supp. 686; *Muldoon v. Pitt*, 4 Daly (N. Y.) 105.

¹¹ *Gates v. Fredericks*, 5 Ariz. 343, 52 Pac. 1118.

¹² *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284, 68 Pac. 226.

¹³ *McLean v. Sanford*, 26 App. Div. (N. Y.) 603, 51 N. Y. Supp. 678.

¹⁴ *Jones v. Menke*, 168 N. Y. 61, 60 N. E. 1053.

ahead," then the landlord will be bound.¹⁵ In some states if the owner permits improvements to be made, or knows they are being made, he will be bound unless he notifies the contractor that he is not to be held liable.¹⁶ In such cases knowledge on the part of the owner need not be shown. Facts stated in the lease are sufficient to bind him.¹⁷

§ 37. Contract—Express or implied—Wife's property.—

There is now no difference generally, between improvements on a married woman's property and those made by a feme sole.¹ Where the law requires a contract, a lien cannot be based on the wife's mere consent or knowledge.² But where she stands by and sees the work done, and does not disclose her ownership,³ or gives directions about the work,⁴ or receives the material, she has so acted that the necessary contract or consent will be implied.⁵ If the statute requires her consent to be in writing, the carrying of a message from her husband

¹⁵ *Butler v. Flynn*, 51 App. Div. (N. Y.) 225, 64 N. Y. Supp. 877, 7 N. Y. Ann. Cas. 403; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203, 58 N. E. 347.

¹⁶ *Santa Monica Lumber, etc. Co. v. Hege*, 119 Cal. 376, 51 Pac. 555; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. The improvements need not be permanent. *Evans v. Judson*, 120 Cal. 282, 52 Pac. 585; *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253. Covenant to keep in good repair will not bind owner. *Aetna Elevator Co. v. Deeves*, 56 Misc. (N. Y.) 565, 107 N. Y. Supp. 63; rehearing denied, 57 Misc. (N. Y.) 632, 108 N. Y. Supp. 718; and judgment affirmed, 110 N. Y. Supp. 124.

¹⁷ *Evans v. Judson*, 120 Cal. 282, 52 Pac. 585; *Santa Monica*

Lumber, etc., Co. v. Hege, 119 Cal. 376, 51 Pac. 555.

¹ See necessity of consent of wife. § 38.

² *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571.

³ *Bruck v. Bowermaster*, 36 Ill. App. 510; *Dennis v. Walsh* (City Ct. Brook), 16 N. Y. Supp. 257.

⁴ *Missouri*.—*Lesse v. Schwartz*, 6 Mo. App. 413; *Collins v. McGraw*, 47 Mo. 495.

Pennsylvania.—*Jobe v. Hunter*, 165 Pa. St. 5, 30 Atl. 452, 44 Am. St. 639; *Bodey v. Thackara*, 143 Pa. St. 171, 22 Atl. 754, 24 Am. St. 526, 28 W. N. C. (Pa.) 470; *Einstein v. Jamison*, 95 Pa. St. 403.

⁵ *Bodey v. Thackara*, 143 Pa. 171, 22 Atl. 754, 24 Am. St. 526, 28 W. N. C. (Pa.) 470.

to the contractor, will not bring her within the statute;⁶ but if knowledge is sufficient to bind her, that is all that is required.⁷

§ 38. **Contract with married women—Executor's right—Ohio statute.**—Section 3192 of the Ohio statutes provides that executors and administrators of deceased owners shall have the same rights and be subject to the same liabilities under this chapter as such owners would enjoy and be subject to if alive; and when a married woman is owner of any such boat, vessel or other water craft, or the owner of the land on which any such house, mill, manufactory, or other building, appurtenance, fixture, bridge or other structure, or any gas well, oil well or other well is situated or erected, or to which the same is removed, as is mentioned in section three thousand one hundred and eighty-four, or is the owner of the lands abutting on any such street, turnpike, road, sidewalk, way, drain, ditch or sewer is mentioned in section three thousand one hundred and eighty-six,¹ and has knowledge of any such construction, erection, alteration, repair, or removal as is mentioned in sections three thousand one hundred and eighty-four, and three thousand one hundred and eighty-six, the same being done under a contract with the husband of such married woman, and without her express objection, such husband shall be deemed and

⁶ *Bliss v. Patten*, 5 R. I. 376. See § 33.

⁷ *Heath v. Solles*, 73 Wis. 217, 40 N. W. 804. Evidence that a married woman knew, soon after excavation was begun, that her husband was constructing a building on a lot owned by her, and that shortly afterwards she executed a mortgage on the premises, and turned the money over

to her husband to use in the building, was sufficient to show knowledge and consent, under Rev. St. 1898, 3314, giving a mechanic's lien on property on which improvements are made, the owner "having knowledge thereof, and consenting thereto." *Lentz v. Eimermann*, 119 Wis. 492, 97 N. W. 181.

¹ See § 44.

held to be the duly and legally authorized agent of said married woman therein.²

§ 39. **Contract with married woman—Ohio statute.**—Under this provision it has been expressly held that a married woman is not liable for an unauthorized contract made in her name by her husband, provided she has no knowledge of the same.¹ If she has knowledge, she is liable.² When a contract is completed by an administrator the lien of mechanics attach as though the intestate had finished the contract.³ If a head contractor dies the amount due him, is subject to the lien of sub-contractors.⁴

§ 40. **Contract—Ratification.**—As a general rule a true owner is not bound by the acts of a person wrongfully in possession,¹ but he may so act after the work is done or the materials furnished, that the contract will be enforced by the ordinary rules relating to the ratification of contracts.² Giving

² 1887, March 5; 84 Gen. Laws, p. 46; Rev. Stat. 1880; 74 Gen. Laws, p. 168, section 9; S. & C. 836.

¹ *Stichenoth v. Rife*, 3 Ohio Cir. Dec. 575, 6 Ohio C. C. 540.

² *Heller v. Hohman*, 5 Ohio Cir. Dec. 338, 12 Ohio C. C. 216; *Slentz v. Kosminsky*, Dayt. (Ohio) 335.

³ *Horton v. Carlisle*, 13 Ohio Dec. (Re.) 113; 2 Disn. (Ohio) 184.

⁴ *Bergin v. Braun*, 15 Ohio Dec. 383, 5 Ohio N. P. (N. S.) 150.

¹ *Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896; *Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 554.

² **Ratification.**—On a petition to enforce a mechanic's lien, it appeared that the work was begun under a contract with defendant,

who was in possession of the land under a contract of purchase, and became the owner before the building was completed. Defendant testified that the house was built by his direction, under the contract with plaintiff; that he watched the progress of the work and was content with the contract, and made some payments to plaintiff after he had purchased the land. The question of ratification was not raised by the pleadings, or submitted to the jury, but was argued at the trial without objection. The court had the right to find, on the evidence, that the contract was ratified by defendant. *Anderson v. Berg*, 174 Mass. 404, 54 N. E. 877. See Dec. & Am. Dig. tit Me chanics' Liens § 77.

a note,³ or otherwise assuming the indebtedness,⁴ acknowledging the debt as a proper charge against him,⁵ or using part of the material,⁶ have been held sufficient facts to justify a ratification. But a ratification is not shown by the mere occupation of a wife with her husband, of the building erected.⁷ And the retention of a contractor's bill,⁸ will not raise a conclusive presumption of ratification. A vendee may bind his interest by adopting the contract.⁹

§ 41. **Contract—Filing, notice.**—As a general rule the statutes do not require that the contract which is the basis of a lien be recorded or filed, but some states, however, have such requirements and they have been sustained by the courts.¹ A California statute provides,² that if the amount exceeds \$1,000 the contract must be in writing, filed with the county recorder, or it is void.³ The statute applies to sub-contractors and material men.⁴ As between contractors and owners,⁵ a slight mis-description of the premises will not defeat the lien.⁶ But

³ *Bankard v. Shaw*, 16 Montg. Co. Law Rep'r, 137, 23 Pa. Co. Ct. 561, 30 Pittsb. Leg. J. (N. S.) 413.

⁴ *Greene v. McDonald*, 70 Vt. 372, 40 Atl. 1035.

⁵ *Scroggins v. National Lumber Co.*, 41 Neb. 195, 59 N. W. 548.

⁶ *Kerrigan v. Fielding*, 47 App. Div. (N. Y.) 246, 62 N. Y. Supp. 115. See also *New Ebenezer Assn. v. Gress Lumber Co.*, 89 Ga. 125, 14 S. E. 892.

⁷ *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 82 N. W. 112, 83 Am. St. 512n; *Garnett v. Berry*, 3 Mo. App. 197.

⁸ *Engler v. Roemer*, 71 Wis. 11, 36 N. W. 618.

⁹ *Courtemanche v. Blackstone*

Val. St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. 275. Posting notice, mortgagee need not *Stearns-Roger Mfg. Co. v. Aztec Gold Min., etc., Co.*, New Mexico 93 Pac. 706.

¹ *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 809, 6 L. R. A. 588. See *Dec. & Am. Dig. tit Mechanics' Liens* § 74.

² *Code Civ. Prac.* 1183.

³ *Spinney v. Griffith*, 98 Cal. 149, 32 Pac. 974; *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801.

⁴ *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

⁵ *Hinckley v. Field's Biscuit, etc., Co.*, 91 Cal. 136, 27 Pac. 594.

⁶ *Dunlop v. Kennedy* (Cal.), 34 Pac. 92.

the amount must be stated.⁷ So in Louisiana it must be recorded.⁸ And though not invalid between parties if not so recorded⁹ it will at least lose its priority over previous liens.¹⁰ The Louisiana courts require a strict compliance with these registry statutes.¹¹ Where the statute permits a workman to record his lien, the owner can not have it taken off without satisfaction.¹² The statute must be followed where it requires

⁷ *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150.

⁸ Civ. Code art. 3274.

⁹ *Van Loan v. Heffner*, 30 La. Ann. 1213; *Roberts v. Hyde*, 15 La. Ann. 51; *Townsend v. Harrison*, 2 La. Ann. 174.

¹⁰ *Wheelwright v. St. Louis, etc., Canal & Transp. Co.*, 47 La. Ann. 533, 17 So. 133; *State v. Recorder of Mortgages*, 28 La. Ann. 534; *Citizens' Bank of Louisiana v. St. Louis Hotel Assn.*, 27 La. Ann. 460; *Taylor v. Crain*, 16 La. (O. S.) 290; *Spence v. Brooks*, 6 La. Ann. 63; *State v. Mexican Gulf R. Co.*, 5 La. Ann. 333; *First Municipality v. Hall*, 2 La. Ann. 549; *Succession of Cox*, 32 La. Ann. 1035.

¹¹ *Bird v. Lobdell*, 28 La. Ann. 305; *Kohn v. McHatton*, 20 La. Ann. 485; *Taylor v. Crain*, 16 La. (O. S.) 290; *Turner v. Parker*, 10 Rob. (La.) 154. The object of registry is notice. When an instrument is recorded, whose registry is intended to affect the rights of third parties, as a privilege, it should contain and show upon its face, and not by reference to documents to be found elsewhere, or to proceedings to be instituted at some future time, all the essential facts which would go to create and fix the privilege.

Wheelright v. St. Louis, etc., Canal & Transp. Co., 47 La. Ann. 533, 17 So. 133.

¹² *Florance v. Mercier*, 2 La. (O. S.) 487. Under a former law, the workman was not required to record it, to protect his claim. *Millaudon v. New Orleans Water Co.*, 11 Mart. (O. S.) (La.) 278; *Turpin v. His Creditors*, 9 Mart. (O. S.) (La.) 562; *Lafon v. Sadler*, 4 Mart. (O. S.) (La.) 477. It only applied to undertakers. *Nolte v. His Creditors*, 6 Mart. (N. S.) (La.) 168; *Miller v. Mercier*, 3 Mart. (N. S.) (La.) 229; *Davidson v. Campbell*, 5 Manitoba, 250.

A memorandum of a building contract, filed in the recorder's office, recited that the general character of the work to be done was raising and making alterations, additions and repairs to a two-story frame building to be used for two tenements. It was held that the memorandum sufficiently showed the general character of the work to be done. *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896.

Contract contemplated.—Under Rev. St. art. 3165, providing that, in order to secure lien for material furnished, the person furnishing it shall have the right, within six months after the debt

the plans and specifications to be filed and recorded.¹³ The recording and registration statutes are generally held to apply to all parties interested, laborers and material men, as well as owners.¹⁴

§ 42. Notice from owner to prevent lien.—In some states the statutes permit the owners to give a notice that will relieve them from liability.¹⁵ These statutes must be closely followed.¹⁶ A verbal notice will not suffice if the statute requires a written

becomes due, to file his contract with the county clerk, the contract contemplated was the one by virtue of which the material was furnished, and a note in consideration of such material, given after it was furnished will not support a claim for a lien. *Lyon v. Ozee*, 66 Tex. 95, 17 S. W. 405.

¹³ See § 32. California Civ. Code Proc. 1183. *Yancey v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Donnelly v. Adams*, 127 Cal. 24, 59 Pac. 208; *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Holland v. Wilson*, 76 Cal. 434, 18 Pac. 412; New Jersey Mechanics' Lien act, Nix. Dig. 487.

¹⁴ *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913. In New Jersey it is necessary that the specifications be filed, if the building is to be exempted from liens. *Babbitt v. Condon*, 27 N. J. L. 154; *Ayres v. Revere*, 25 N. J. L. 474. And in Texas for purpose of registration, the statute divides contracts out of which the mechanic's lien arise, into two kinds, verbal and written. *Martin v. Roberts*, 57 Tex. 564.

¹⁵ California.—Civil Code, 1192; Minnesota.—Gen. Stat. 1878, ch. 90 § 3; Nevada.—Mechanics'

lien law § 1; Oregon.—Code, § 3672; Washington.—Code § 1965. See Dec. & Am. Dig. tit. Mechanics' Liens § 78.

¹⁶ *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 510, 22 Pac. 217; *West Coast Lumber Co. v. Apfield*, 86 Cal. 335, 24 Pac. 993. Under Code Civ. Proc. 1192, relieving an owner of land from mechanic's lien if he shall, "within three days after he shall have obtained knowledge of the construction—or the intended construction," post on the land a notice disaffirming liability, such notice may be posted within three days after construction is actually commenced on leased land, though its owner had knowledge for a longer period of the intention to construct. *Birch v. Magic Transit Co.*, 139 Cal. 496, 73 Pac. 238. See also *Allen v. Rowe*, 19 Ore. 188, 23 Pac. 901; *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926; *John Martin Lumber Co. v. Howard*, 49 Minn. 404, 52 N. W. 34; *Kraus v. Murphy*, 38 Minn. 422, 38 N. W. 112. Mechanic's Lien Law 1889, § 5, subjecting the estate of a landowner to a lien for improvements made by others with his knowledge, unless he shall give

notice.¹⁷ Under such statutes, a mortgagee is not an owner.¹⁸ However, if the lease makes the owner liable, notice will not relieve him.¹⁹

§ 43. **Persons entitled to lien by direct contract.**—When the mechanic's lien laws were first passed they applied only to persons who might have furnished labor or material for the erection of the improvement under a contract direct with the owner and very often designated these particular mechanics who might avail themselves of the law. Now there are three classes of persons who may avail themselves of the law under a direct contract with the owner, these are, First, persons who perform labor themselves, second, persons who furnish materials, third, persons who contract for and do the work themselves or through others. The first of these are usually termed laborers, second, material men, third, contractors. The first two designated are used when the person furnishes labor and materials to a contractor, and when they are serving in that capacity they usually have their lien under the rights conferred upon a sub-contractor. The statute is not now limited to particular mechanics, but usually uses the word "any person" furnishing material, or labor etc.¹ In order to

the notice of his want of consent as therein prescribed, casts on the landowner the burden of excusing his default to comply with the law, making the improvement prima facie evidence that it was made with his consent. *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926. See also *Nottingham v. McKendrick*, 38 Ore. 495, 63 Pac. 822.

¹⁷ *Shaw v. Tompson*, 105 Mass. 345; *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30; *Title Guarantee & Trust Co. v. Wrenn*, 35 Ore. 271, 56 Pac. 271; *Allen v. Rowe*, 19 Ore. 188, 23 Pac. 901. Under

Code, § 1965, providing that the notice to prevent a lien from attaching to the owner's interest, shall be given 10 days after he has notice of the making of the improvement, his interest is not subject to a lien because of his failure to give such notice, unless it affirmatively appears that he had notice that the improvement was being made. *Cutter v. Striegel*, 4 Wash. 346, 30 Pac. 326.

¹⁸ *Williams v. Santa Clara Min. Co.*, 66 Cal. 193, 5 Pac. 85.

¹⁹ *Hall v. Parker*, 94 Pa. St. 87, 109.

¹ *Sweet v. James*, 2 R. I. 270;

come within the statute the work done must be of a lienable kind.² When the statute limited its application to "mechanics" and "artisans" it was held that one who owned a sawmill and machinery, and works therein, not as a mere speculator or buyer and seller of lumber, but in shaping and fitting lumber to be useful as materials in the building, came within the term.³ It has been held that a plasterer is not a "mason" or "carpenter" but is included in the term "laborer" or "mechanic."⁴ Neither is a mechanic necessarily a "contractor,"⁵ although a carpenter may be both a "mechanic" and a "carpenter."⁶ House painters,⁷ and paper hangers, are "mechanics."⁸ But a man who furnishes lumber for a building is neither an "artisan," "builder" nor a "mechanic."⁹ A teamster has been held to be a manual "laborer."¹⁰ A miner is a "laborer."¹¹ But a person employed to act as a clerk, and make himself generally useful, is not a "laborer" within the meaning of the statute.¹² Status as a "laborer" does not depend upon whether the person is employed by the day or the week or month.¹³ Neither will the fact that the person is not a mechanic, prevent him from coming within the term "laborer."¹⁴ But laborers working away from the building or improvement, as for in-

Garing v. Hunt and Claris, 27 Ont. 149. See §§ 9, 14 16 and Dec. & Am. Dig. tit. Mechanics' Liens, § 79.

² Getty v. Ames, 30 Ore. 573, 48 Pac. 356; Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

³ Gullledge v. Preddy, 32 Ark. 433.

⁴ Fox v. Rucker, 30 Ga. 525; Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; Parker v. Bell, 7 Gray (Mass.) 429.

⁵ Savannah, etc., R. Co. v. Grant, 56 Ga. 68.

⁶ Thurman v. Pettitt, 72 Ga. 38.

⁷ Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

⁸ Freeman v. Gilpin, 9 Pa. L. J. 427.

⁹ Duncan v. Bateman, 23 Ark. 327, 79 Am. Dec. 109; Boutner v. Kent, 23 Ark. 389.

¹⁰ McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272.

¹¹ Holden v. Bright Prospects Gold Mining and Development Co., 6 Brit. Col. L. 439.

¹² Nash v. Southwick, 120 N. Car. 459, 27 S. E. 127.

¹³ Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

¹⁴ Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

stance, making brick in the contractor's brickyard, are not entitled to a lien as laborers.¹⁵

§ 44. **Lien under contract direct with owner—Ohio statute.**—Section 3184 provides that every person who shall do or perform any work or labor upon or furnishes machinery, material or fuel for constructing, altering, or repairing a boat, or vessel, or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for digging, drilling, boring, operation, completing or repairing of any gas well, oil well, or any other well, or performs labor in altering, repairing, or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract, expressed or implied, with the owner, part owner or lessee, of any interest in real estate or the authorized agent of the owner, part owner, or lessee of any interest in real estate, shall have a lien to secure payment of the same upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, furnace or other building, or appurtenance, fixture, bridge, or other structure, or upon such gas well, oil well, or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise of the owner, part owner, or lessee in the lot of land upon which the same may stand, or to which the same may be removed. (97 Ohio Laws, p. 499.)

1. *Construction generally.*

These mechanics' liens are considered to be in derogation of the common law, and therefore when the question under consideration is, whether or not the law covers a certain kind of property, it is strictly construed. But even then, no narrow construction is to be given to it. This construction is given

¹⁵ *Haynes v. Holland* (Tenn. Ch. App. 1898), 48 S. W. 400.

upon the theory that the courts cannot create liens, they can only enforce the law in reference to them. If the question before the court, is as to the enforcement of the lien, or the lien right, and not as to whether it is within the terms of the statute, it is then considered to be of a remedial character, and is given a liberal construction.² The law of the place where the contract is to be enforced governs and controls its construction.³ While the lien exists only by the force of some statute,⁴ yet it is brought into being by the acts of the owner in employing and contracting for the work to be done.⁵ Laws providing for these liens are founded upon the highest public policy and are constitutional and valid.⁶ Considerable controversy was had in this state over a previous statute which sought to make the owner directly responsible to a subcontractor or material man. Our Supreme Court, however, finally held that it was unconstitutional.⁷ The Supreme Court of the United States, however, arrived at the opposite conclusion.⁸

2. *Who may acquire.*

The language of the various sections of the Ohio Statute, which prescribe the individual or person who may claim provisions of the statute, use the words "every person." This is following the general trend of legislation in the various states.

² *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737; *Edwards v. Edwards*, 24 Ohio St. 402; *Thomas v. Huesman*, 10 Ohio St. 152; *Beckel v. Petticrew*, 6 Ohio St. 247; *Rutherford v. Cincinnati, etc., R. Co.*, 35 Ohio St. 559; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 67; *Lapham v. Ransford*, 27 Ohio C. C. 80, 5 Ohio C. C. (N. S.) 577, affirmed, 74 Ohio St. 497, 78 N. E. 1130. See § 8.

³ *Mack v. DeGraff, etc., Quarries*, 57 Ohio St. 463, 49 N. E. 697, 63 Am. St. 729. See § 3.

⁴ *McCune v. Snyder*, 8 Ohio Dec. 316, reversed; *McCune v. Snyder*, 9 Ohio Cir. Dec. 572, 18 Ohio C. C. 24.

⁵ *In re Beck Provision Co.*, 11 Ohio Fed. Dec. 449.

⁶ *Trust v. Miami Oil Co.*, 10 Ohio Cir. Dec. 372, 19 Ohio C. C. 727.

⁷ *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; affirming *Palmer v. Tingle*, 6 Ohio Cir. Dec. 709, 9 Ohio C. C. 708.

⁸ *Great Southern Fireproof Hotel Co. v. Jones*, 14 Ohio Fed.

In the earlier history of mechanics' lien law, the language restricted the application of the statute to mechanics, laborers, etc. This broad term would in effect include any person, either natural or artificial, that might perform the labor or furnish the materials for which a lien is granted. If the person should die, the administrator may complete the work.⁹ If a person under disability, such as a minor, should furnish such material, the owner of the property receiving the benefit of his labor will not be permitted to take advantage of this disability. In such a case the owner should disaffirm the contract before it is executed. This term will also include non-residents.¹⁰ In accord with this broad holding of the term, an architect is included.¹¹ The promoters of an enterprise are held however, not to come within its meaning.¹² Of course it would include a partnership and under certain conditions may be held to include a receiver, and an assignee, where the person furnishing the material makes an assignment for the benefit of creditors. There is not much doubt but that the assignee, of a perfected lien can enforce the same, but it is extremely doubtful whether the assignment of a money claim will carry with it the right to perfect the lien. The authorities in this state seem to be against that proposition.¹³ The assignment of the owner for the benefit of creditors does not defeat the lien.¹⁴

3. *Kind of services.*

Under Section 3184, if the "work," "labor," "machinery" "material," or "fuel," is done or furnished for a "boat," "vessel," or other water-craft, it must be in "constructing," "altering"

Dec. 337, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. 576.

⁹ Vernon v. Harper, 79 Ohio St. See §§ 9, 26.

¹⁰ Mack v. DeGraff, etc., Quarries, 57 Ohio St. 463, 49 N. E. 697, 63 Am. St. 729.

¹¹ Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 9 Ohio Fed. Dec. 2, 66 Fed. 683.

¹² Burnap v. Sylvania Butter Co., 5 Ohio Cir. Dec. 582, 12 Ohio C. C. 639.

¹³ Hamilton v. Stillwaugh, 11 Ohio C. C. 182, 5 Ohio Cir. Dec. 324. See §§ 9, 165.

¹⁴ Hart v. Globe Iron Works, 37 Ohio St. 75.

or "repairing," the same. If it is furnished on a "house," "mill," "manufactory," "furnace," or other building, "appurtenance," "bridge" or other structure, it must be in "erecting," "altering," "repairing" or "removing" the same. If such work is done on a "gas well," "oil well," or any other well, it must be in "digging," "drilling," "boring," "operation," "completing," or "repairing" the same. If the labor is done on an "oil derrick," "oil tank," "oil or gas pipe line," it must be in "altering," "repairing" or "constructing" the same, and if the lien is claimed for drainage of any lot or land, it must be for furnishing tile.

A subsequent section (3186) might likewise include the tile furnished for drainage.

Under Section 3184, provision is made for labor in mining coal. Under this section, relating to a principal contractor, the intent of furnishing the material would not be of very great importance for if used in the building, it would be presumed that the contractor had reserved the right to file the lien. However, the materials must be of a kind that are used in the various kinds of work above indicated, and must be purchased under a contract express or implied, that the materials were for use upon the improvement as claimed in the lien.¹⁵ It does not include the tools used in its construction or lumber for scaffolding, or board of hands, or matters of like character. Where the term, "machinery" is used, it is held that it applies only to such as was used in the construction of a house and left there.¹⁶ Whether plans and specifications disconnected from the labor of a superintendent will be included is not settled.¹⁷ Materials are delivered when the title vests in a head contractor.¹⁸

¹⁵ *Choteau v. Thompson*, 2 Ohio St. 114. See § 16.

¹⁶ *Bender v. Stettinius*, 10 Ohio Dec. (Re.) 186, 19 Ohio L. Bull. 163. See § 18.

¹⁷ *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.*, 9 Ohio Fed. Dec. 2, 66 Fed. 683.

¹⁸ *Franklin Bank v. Cincinnati*, 10 Ohio Dec. 545, 8 Ohio N. P. 517. See §§ 16-22.

4. *Character of structure subject to lien.*

Sections 3184, 3184a and 3186, would seem to cover almost all kinds of structure or improvements.

Section 3184 provides for a lien on a "boat," or "vessel," or other "water-craft," "house," "mill," "manufactory," "furnace," or other "building," "appurtenance," "fixture," "bridge," or other structure, or any "gas well," "oil well," or any other well, or "oil derrick," "oil tank," "oil" or "gas pipe line," as well as "tile" for drainage.

Under 3184a, labor in coal mining is provided for, and under 3186, improvements included in any "street," "turnpike," "road," "sidewalk," "way," "drain," "ditch," or "sewer."

In one case, it was held that work done and labor performed in grading and sodding real estate, would not be included.¹⁹ In another case where sod was furnished to a public park, it was included.²⁰ The statute does not apply to public buildings,²¹ unless it is expressly so provided in the statute.²² An "oil well" consists of the hole, drive pipe, casing and tubing.²³ A lien on a mill will include all appurtenances, including everything used to drive, as engine, boiler piping, belting, but does not include planers, tenant machines or machines not set up.²⁴ The statute does not include a fence built for temporary purpose not included in principal contract,²⁵ nor railroad real estate,²⁶ but may include a railroad bridge.^{26a}

¹⁹ *Stichenoth v. Rife*, 3 Ohio Cir. Dec. 575, 6 Ohio C. C. 540. See § 12.

²⁰ *Fox v. Wunker*, 9 Ohio Cir. Dec. 176, 18 Ohio C. C. 610. See § 15.

²¹ *Lumber Co. v. Purdum*, 41 Ohio St. 373.

²² *Clark v. Haggerty*, 3 Ohio Cir. Dec. 118, 5 Ohio C. C. 235, *affd.* 26 Ohio L. Bull. 376.

²³ *Devine v. Taylor*, 4 Ohio Cir. Dec. 248, 12 Ohio C. C. 723, 1 Ohio Dec. 153. A reservoir construct-

ed for an electric plant is an appurtenance. *Brush Electric Co. v. Warwick Mfg. Co.*, 6 Ohio Dec. 475, 4 Ohio N. P. 279.

²⁴ *Gashe v. Ohio Lumber Co.*, 5 Ohio Dec. 130, 31 Ohio L. Bull. 189.

²⁵ *Van Cleve Glass Co. v. Wame-link*, 2 Ohio Dec. 163, 1 Ohio N. P. 203.

²⁶ *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 67. See § 14.

^{26a} *Rutherford v. Cincinnati, etc., R. Co.*, 35 Ohio St. 559.

5. *Contract with the owner.*

There can be no lien in Ohio, either between the contractor or the subcontractor, and a person who owns the land upon which the improvement is located, unless there be a contract express or implied.²⁷ It therefore becomes one of the essentials to show that there was a valid contract between the owner and the principal contractor, which could be enforced in an ordinary action at law, for recovery of a debt. As a general proposition, it may be said that such a contract must be made with an owner who is capable of contracting. This will exclude infants, and persons under like disability. A married woman will not be excluded, and the statute now specifically provides that if the work is done under contract with the husband of a married woman without her express objection, he is deemed her legally authorized agent.²⁸ Of course before a married woman can be bound, she must have knowledge of such work. A contract, as between owner and principal contractor, may be presumed from the knowledge of the parties.²⁹ If the work is done under contract with any other person than that of an owner, no lien will exist.³⁰ Even the fact that a certain person was in possession will not create a lien against the true owner.³¹ A vendee in possession can only make his interest liable. This interest would be the value of the property conveyed less the purchase price unpaid.³²

²⁷ Portsmouth Iron Co. v. Murray, 38 Ohio St. 323. See §§ 24, 35.

²⁸ See § 38.

²⁹ Hazard Powder Co. v. Loomis, 13 Ohio Dec. (Re.) 333, 2 Disney (Ohio) 544.

³⁰ Feike v. Cincinnati, etc., R. Co., 7 Ohio Cir. Dec. 652, 14 Ohio C. C. 186, affirmed (unrep.); Case-

ment v. Railway Co., 61 Ohio St. 647, 57 N. E. 1131.

³¹ Filberl v. Davis, 4 Ohio Dec. (Re.) 496, 2 Clev. L. Rec. 265; Jerecki Mfg. Co. v. Struther, 8 Ohio Dec. 5, 14 Ohio C. C. 400.

³² Mutual Aid Bldg., etc., Co. v. Gashe, 56 Ohio St. 273, 46 N. E. 985. See §§ 35, 36, 37.

6. *Who is owner.*

A subsequent section of the statute, 3184f, extends the meaning of the word owner to every person, including cestui que trust, for whose immediate use, enjoyment or benefit, any "building," "erection" or "improvement" shall be made. So under the statutes of Ohio, the word owner is held to include whatever species of title the person making the contract had in the property. Possession is one of the lowest species of title, and yet, courts have held that it is sufficient to make the holder of it an owner within the statute.³³ But where some persons were merely subscribers to the contract for the purchase of a lot, upon which a building is to be erected, they were not such owners as come within the meaning of the statute.³⁴

It is specially provided (3184) as to the rights, where the contract is made with the lessee, when a person comes within the meaning of this term.

A husband is an owner so far as his curtesy rights are concerned, and so with a widow in reference to her dower right. In either case, however, it is necessary that the dower be assigned. An inchoate right is not sufficient. An infant can only be an owner within the law provided he ratified his contract after he became of age. Neither a guardian nor an administrator can be held to be an owner, but a trustee and executor may be, if some species of title is vested in him.³⁵

7. *Leasehold.*

Section 3184b provides that every building erected, or other improvement made, or machinery or material furnished, mentioned in section three thousand one hundred and eighty-four, on leased lots or lands, shall be held for debt contracted for or on account of same, and also the leasehold term for such

³³ *Dakin v. Lecklider*, 10 Ohio Cir. Dec. 308, 19 Ohio C. C. 254. *Co.*, 5 Ohio Cir. Dec. 582, 12 Ohio C. C. 639.
See §§ 26, 28.

³⁵ See §§ 26-106.

³⁴ *Burnap v. Sylvania Butter*

lot and land on which the same is erected or made; and in case the lessee shall have forfeited his lease, the purchaser of the building and leasehold term, or so much thereof as remains unexpended (unexpired), shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay to the lessor all arrears of rent, or other money, interests, and costs due under said lease, unless the lessor shall have regained possession of the leasehold land, or obtained judgment for the possession thereof, on account of the non-compliance by the lessee with the terms of the lease, in which case the purchaser of the improvements, under this act, shall have the right only to remove the improvements within sixty days after he shall purchase the same, and the owner of the ground shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of removing the building.³⁶

The above section is for the purpose of letting the mechanic realize upon his claim, when the improvement is upon leased property, and in such case, even though the contract between the lessor and lessee might be to the contrary, the purchaser of the building would also have the right to use the premises during the remainder of the leasehold term. If the conditions of the original lease have been violated, so that the term has expired, then the lien claimant may sell the improvement and the purchaser would have a right to remove it within 60 days from the time of the purchase, the owner being entitled to receive rent for that period of time, according to the terms of the lease.

This is the only instance under the Ohio law whereby the building or improvement may be removed to satisfy the lien. If the contract between the lessor and lessee provides that the rents due and to become due should be a first lien on the premises, then the mechanic would have knowledge of such provision, and would take subject thereto, and the claim for rents

³⁶ Act April 15, 1889, Ohio Laws, 86, 373, 374. See § 141.

would be a prior lien to that of the mechanic.³⁷ This claim of the mechanic is subject likewise to all other claims or liens, which were valid and existing upon the property at the time the lien attached.³⁸

8. *Estate and extent of interest liable.*

Unless the statute specifically so provides, the law in Ohio is, that the lien attaches to the improvement as a part and parcel of the land upon which it is situated. Section 3184 provides the manner in which such right may be enforced, where an improvement is put upon real estate by a lessee, but in no other way can the improvement itself be made subject to the claim of the mechanic, separate and apart from the lot of land upon which it is located. Whatever interest the owner held in the real estate, that interest may be subjected to the lien, and no more, unless the owner has, by some act of his, put himself in a position to be estopped from claiming the contrary.³⁹ It cannot operate beyond the limits of the county in which the lien is filed.⁴⁰ An equitable interest is subject to lien.⁴¹ The statute itself makes the lien extend to any appurtenance or fixture, in the determination of what is included in these terms, the general rule of law determining the same, would apply in determining whether they were included in the mechanics' liens. As to the extent of territory, that is covered by the lien, it is said in *Choteau v. Thompson*, 2 Ohio St. 114, "That by the words, 'lot of land upon which the same shall stand' in the same section, is not meant merely the ground covered by the building; nor do they, necessarily confine the

³⁷ *Young v. West Side Hotel Co.*, 6 Ohio Cir. Dec. 63, 9 Ohio C. C. 127.

³⁸ Tenant has no right to remove building. *Dutro v. Wilson*, 4 Ohio St. 101. Attaches to gas well. *Acklin v. Waltermier*, 10 Ohio Cir. Dec. 629, 19 Ohio C. C. 372. See § 141.

³⁹ *Choteau v. Thompson*, 2 Ohio St. 114. See §§ 132-143.

⁴⁰ *Marlatt v. Hascall*, 13 Ohio Dec. 364.

⁴¹ *Smith v. Woodruff*, 12 Ohio Dec. (Re.) 140, 1 Handy (Ohio) 276; *Dakin v. Lecklider*, 10 Ohio Cir. Dec. 308, 19 Ohio C. C. 254.

lien to the particular lot, as known on the town plat on which the building stands. On the contrary, where, as in the present instance, two adjacent town lots are used, without any actual division between them, as one mill lot, a part of the buildings and machinery being upon one and a part upon the other, the lien extends to both lots, though the precise spot where the work was done, may be within the limits of one of them. And the case is the same whenever two or more adjacent lots are thrown into one lot, the ideal lines of division being disregarded and used for a common purpose, whatever that purpose may be." What would be included in the case of a dwelling or barn, built upon a farm, the court expressly refuses to decide. The lien only attaches to those items furnished under the contract which are suitable to the building.⁴²

9. *Lien for labor on and materials for roads, streets, ditches, sewers, etc.*

Under section 3186 a person who performs labor or furnishes material for constructing, altering, or repairing any street, turnpike, road, sidewalk, way, drain, ditch, or sewer, by virtue of a private contract between him and the owner of lands abutting thereon, or his authorized agent, shall have a lien for the payment of the same against the lands of such owner.⁴³

10. *Abutting land owner.*

In order to have a lien under this section, the work must be under contract with the abutting land owner or his agent. If the owner's land does not abut the improvement, no lien can be had. Lands are said to abut upon a street, road or other premises where no other street or land intervenes.⁴⁴ An estate opposite a park, separated from it by a county road is not

⁴² *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

⁴³ 74 Ohio Laws 168, § 3.

⁴⁴ *Am. and Eng. Ency. of Law*, (2d ed.), vol. 1, p. 224.

an abutting estate.⁴⁵ Where a small stream intervened between a lane and a lot of land, it was held that the premises adjoined, but did not abut, by one judge, and by another that they were abutting.⁴⁶ A lot cannot be said to abut on a public road where a railroad, the bed of which is owned by the company, runs between the lot and the land.⁴⁷ A sidewalk and lot with a street between are not abutting.⁴⁸

11. *Lien upon mines for labor.*

Section 3184a provides that any person who performs labor in mining coal, or removing the same from the mines, or other manual labor connected therewith, for any coal or mining company owning, operating, or leasing coal mines within this state, by virtue of a contract with the owner, owners, or his or their authorized agent, shall have a lien to secure the payment for the same upon the mine or mines of such company and upon all the rights of the company or corporation owning or leasing such mines, and upon all the personal property of any such company or corporation used in conducting their business of mining coal, whether the same be located at or near the mines or elsewhere.⁴⁹

The above section seems to extend the idea of mechanics' liens in two directions, namely: to that for mere manual labor, and giving the lien upon personal property. Whether the words "other manual labor" would restrict the application of this statute to manual labor alone, may be questionable.

Probably it would be extended under the first clause to include persons who perform labor in mining coal, other than merely in a manual way. It might include the work of their

⁴⁵ *Holt v. City Council*, 127 Mass. 408.

⁴⁶ *Wakefield Local Board of Health v. Lee*, L. R. 1, Ex. Div. 336.

⁴⁷ *Philadelphia v. Eastwick*, 35 Pa. St. 75.

⁴⁸ *Wakefield Urban Sanitary Authority v. Mander*, L. R. 5 C. P. Div. 248.

⁴⁹ Act Mar. 27, 1889, 86 Ohio Laws 143.

teams and matters of that character. The lien upon personal property would probably be valid only so long as the property was in the possession of the company.

It is to be doubted whether it is the intention of this statute to put an incumbrance on the personal property that would prevent a legal sale of it, by passing possession, even if the lien should be on file, where the purchaser is innocent of the laborer's claim.

§ 45. Indiana statute—reenactment. The mechanic's lien law of Indiana previously in force for more than twenty years, was declared unconstitutional so far as it provided that "contractors and subcontractors" might acquire liens, because the title of the original act¹ only applied to "mechanics, laborers and material men," and did not embrace contractors.^{1a} But the legislature, which was in session at the time, immediately re-enacted the statute in the same words with an amended title, and declaring an emergency which made it take effect at once, though saving all rights under pending litigation.^{1b}

§ 45a. Laborers', contractors' and sub-contractors' lien—Indiana statute.—Section 8295^{1c} provides that contractors, sub-contractors, mechanics, journeymen, laborers and all persons performing labor or furnishing materials or machinery for the erection, altering, repairing or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water works or other structure, or for constructing, altering or repairing or removing of any sidewalks, walk, stile, well, drain, sewer or cistern, may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern which they may have erected, altered.

¹ Acts Ind. 1883, p. 140.

^{1a} Indianapolis N. T. Co. v. Brennan (Ind.), 87 N. E. 215; Fleming v. Greener (Ind.), 87 N. E. March 9, 1909; Cleveland, etc.,

R. Co. v. Defrees (Ind.), 87 N. E. March 10, 1909.

^{1b} Burns' 1908, §§ 8295-8307, re-enacted by Acts 1909, p. 295.

^{1c} Burns' 1908, § 8295, re-en-

repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, ware-room, store-room, manufactory or structure, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern, shall be a first lien upon all the machinery, tools, stock of material, work finished or unfinished located in or about such shop, mill, ware-room, store-room, manufactory or other buildings; bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern or used in the business thereof; and should the person, firm or corporation be in failing circumstances the above mentioned claims shall be preferred debts, whether claim or notice of lien has been filed or not.

Section 8296^{1d} relates to the extent of lien and provides that the entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is incumbered by mortgage, the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and (be) removed within ninety (days) after the sale by the purchaser.

1. *Generally.*

The statute of Indiana, giving a lien on real estate for mechanics, etc., is one of that character, that without there being

acted by Acts 1909, p. 295, § 1.

^{1d} Burns' 1908, § 8296, re-enacted by Acts 1909, p. 296, § 2.

a direct contract between the person doing the work, or furnishing the material, and the owner, it may give a lien to the person doing the work. This statute has been vigorously attacked as being unconstitutional, because it deprives persons of their property without due process of law, and also because it impairs the obligation of contracts and grants privileges to one class of citizens not granted to others. But the Supreme Court has decided against these claims and declared the statute constitutional.^{1e} The court has also decided that the provision of the law allowing an attorney's fee to the plaintiff, is constitutional.² The lien is purely a creature of statute,^{2a} and although it cannot be enforced without a contract between the owner and some one, yet it does not exist by virtue of the contract.³ And while the lien is created by statute, and must be strictly followed in securing the lien, the law is not construed with the strictness usual to statutes derogatory of the common law, but in accordance with the principles of substantial justice.⁴ The right to the lien may be waived,⁵ but the taking of a note is not such waiver,⁶ but may be prima facie evidence of payment and a waiver if the note is bankable.⁷ A

^{1e} *Smith v. Newbau*, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; *Barrett v. Millikan*, 156 Ind. 510, 60 N. E. 310, 83 Am. St. 220. The Ohio Supreme Court decided the same kind of a statute unconstitutional.

The case of Indianapolis N. T. Co. v. Brennan (Ind.), 87 N. E. 215, holding that the Indiana statute of 1883, as afterward amended, was unconstitutional in part, was based entirely on a defect in the title of the act, which defect was cured by acts 1909, page 295, passed a few days after that decision was announced.

² *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

^{2a} *Potter M. Co. v. A. B. Meyer & Co. (Ind.)*, 86 N. E. 837.

³ *Beach v. Huntsman*, Ind. App., 85 N. E. 523; *Davis, etc., Mfg. Co. v. Nice*, 15 Ind. App. 117, 43 N. E. 889.

⁴ *Williamson v. Shank*, 41 Ind. App. 513, 83 N. E. 641; *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152. See §§ 2, 8.

⁵ *Swift Co. v. Doll*, 39 Ind. App. 653, 80 N. E. 678. See § 173.

⁶ *Goble v. Gale*, 7 Blackf. 218, 41 Am. Dec. 219n; *Millikin v. Armstrong*, 17 Ind. 456; *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

⁷ *Hill v. Sloan*, 59 Ind. 181; *Schneider v. Kolthoff*, 59 Ind. 568.

stipulation in a contract of sale that the title shall remain in the seller until the price is paid does not waive the right to a lien.⁸ When a mechanic's lien becomes vested, it cannot be impaired by legislative action.⁹

2. *Who may acquire.*

The words "all persons" following the enumerated class of contractors, subcontractors, mechanics, journeymen and laborers, would seem to be broad enough to include every individual or corporation that would bring itself within the statute by performing the labor designated. But it only includes persons who perform the kind of labor or furnish the kind of materials included within the statute.

Thus, if a person sold material to the owner, and had nothing to do with placing the property in the building, he would be a materialman but the person from whom he purchased the property would not be included in the statute.¹⁰ If a person furnished the proper material to be used and delivered it on the premises, he would be entitled to a lien, although it were not used, if retained for making current repairs, as occasion should demand.¹¹ A person performing labor for a contractor is within the statute, and may claim a lien,¹² and one who takes a sub-contract under a sub-contractor is included, whether he does the work by day or otherwise.¹³ Laborers who hauled away the dirt that remained after filling up trenches, for a heating plant, as well as those who dug the trenches in the streets, are included,¹⁴ as well as a teamster.¹⁵ A general manager is not within the statute,¹⁶ nor can a surety

⁸ *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003.

⁹ *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770.

¹⁰ *Caulfield v. Polk*, 17 Ind. App. 429, 46 N. E. 932. See § 9.

¹¹ *Totten, etc., Foundry Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703.

¹² *Merritt v. Pearson*, 58 Ind. 385.

¹³ *Stephens v. Duffey*, 41 Ind. App. 385, 83 N. E. 268.

¹⁴ *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518.

¹⁵ *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272.

¹⁶ *Rayner v. Kokomo Ladder*,

on a bond enforce the lien for materials furnished by his principal.¹⁷ A claim secured by a mechanic's lien may be assigned by parol, and such assignment transfers the lien.^{17a} But the mere assignment of an account or debt on which the assignor might have obtained a mechanic's lien, such as "time checks" evidencing wages earned, gives the assignee no right to acquire or perfect a lien.^{17b}

3. *Character of labor or material.*

The statute provides that the lien shall cover material or machinery of any description. So it would seem that the language is broad enough to include all kinds of material or work. A question arises, whether or not the materials must be not only furnished, but used, before they can be included in the lien. Decisions of this state seem to be that they must be actually used in the construction.¹⁸ It is not necessary that they be furnished on the credit of the building, if they are actually used.¹⁹ The destruction of the building, after the materials are used, will not destroy the right.²⁰ The statute includes the labor performed by a trench machine in digging a ditch for a waterworks system, for a private owner, if the

etc., Co., 153 Ind. 315, 54 N. E. 1061.

¹⁷ McHenry v. Knickerbacker, 128 Ind. 77, 27 N. E. 430.

^{17a} Trueblood v. Shellhouse, 19 Ind. App. 91, 49 N. E. 47. See § 165. (See Shapiro v. Schultz, 32 Ind. App. 219.)

^{17b} Fleming v. Greener (Ind.), 87 N. E. March 9, 1909, overruling Midland R. Co. v. Wilcox, 122 Ind. 84; McElwaine v. Hosey, 135 Ind. 481; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51. See Fleming v. Greener, 41 Ind. App. 77, 83 N. E. 354.

¹⁸ Crawford v. Crockett, 55 Ind. 220; Hill v. Sloan, 59 Ind. 181;

Lawton v. Case, 73 Ind. 60; Jones v. Hall, 9 Ind. App. 458, 35 N. E. 923, 37 N. E. 25; Leeper v. Myers, 10 Ind. App. 314, 37 N. E. 1070; Farrell v. Lafayette Lumber, etc., Co., 12 Ind. App. 326, 40 N. E. 25; Barnett v. Stevens, 16 Ind. App. 420, 43 N. E. 661, 45 N. E. 485; Miller v. Fosdick, 26 Ind. App. 293, 59 N. E. 488; Potter M. Co. v. A. B. Meyer & Co. (Ind.), 86 N. E. 837. See §§ 17-19.

¹⁹ Clark v. Huey, 12 Ind. App. 224, 40 N. E. 152.

²⁰ Smith v. Newbaur, 144 Ind. 95, 42 N. E. 40, 1094; Bratton v. Ralph, 14 Ind. App. 153, 42 N. E. 644. See § 186.

lien is asserted on behalf of the person who actually did the work by means of such machine; but not a claim for rent, repairs, etc., on behalf of an owner who merely leased his machine at a fixed rental for use by the persons doing the work.²¹ The statute further provides that the labor must be performed or the materials furnished for the erection, altering, repairing, or removing any house, etc., or for the construction, altering, repairing or removing of any sidewalk, etc. These terms seem to be broad enough to include almost every kind of labor that could be performed in and upon the designated improvements. But in order that a mechanic's lien may be acquired for materials furnished they must have entered into and become a part of the property as improved.^{21a} A lien cannot be acquired for fuel burned in operating a machine used in performing work.^{21b}

4. *Property subject to.*

The terms of the statute are apparently broad enough to include every kind of structure, but by reason of public policy, public buildings are not subject to a lien; thus, a courthouse, or a county jail,²² or school house,²³ or public bridges,²⁴ or public waterworks, are not to be subject to a lien.²⁵ But those of a semi-public character, like a church belonging to a re-

²¹ *Potter Mfg. Co. v. A. B. Meyer & Co.*, — Ind. —, 86 N. E. 837. *v. Delaware Co.*, 100 Ind. 59. See § 10.

^{21a} *Potter Mfg. Co. v. A. B. Meyer & Co. (Ind.)*, 86 N. E. 837, 839.

^{21b} *Mossburg v. United Oil & G. Co. (Ind. App.)*, 87 N. E. April 2, 1909; *Cincinnati, etc., R. Co. v. Spera*, 36 Ind. App. 315, 73 N. E. 293.

²² *Parke County v. O'Conner*, 86 Ind. 531, 44 Am. Rep. 338; *Secrist*

²³ *Fatout v. Board*, 102 Ind. 223, 1 N. E. 389; *Jeffries v. Myers*, 9 Ind. App. 563, 37 N. E. 301; *Townsend v. Cleveland Fireproofing Co.*, 18 Ind. App. 568, 47 N. E. 707.

²⁴ *Pike County v. Norrington*, 82 Ind. 190.

²⁵ *Kentucky Lead, etc., Co. v. New Albany Water Works*, 62 Ind. 63.

ligious society, is not within the exemption.²⁶ Oil wells,²⁷ and gas wells, are subject to the lien.²⁸ Fixtures in a house, such as chandeliers,²⁹ and appurtenances to the building or structure, are included.³⁰ But the lien does not attach to specific articles in a building or structure exclusive of the building or structure itself.³¹ For tin gutters taken from a farm house, in repairing its roof, and placed on the barn, a lien on both buildings may be secured for the work.³² Materials to construct a heating plant will be included.³³ The fact that the building is not completed, does not necessarily prevent the material man from acquiring a lien.³⁴ Labor performed on an oil well,³⁵ or the construction of a large tank upon the premises, so as to become a fixture, will furnish the basis for a lien.³⁶ A building equipped with machinery for the protection, and conveyance of steam for heating purposes, under a municipal franchise, and the pipes radiating therefrom, constitute a "manufactory" within the statute.³⁷ Contractors for work on public buildings are required to give bond and the subcontractor can enforce his demand against the bond.³⁸ Even if the commissioners failed to require a bond, the county will not be responsible.³⁹

²⁶ *Gortemiller v. Rosengarn*, 103 Ind. 414, 2 N. E. 829.

²⁷ *Haskell v. Gallagher*, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. 250.

²⁸ *Montpeller Light, etc., Co. v. Stephenson*, 22 Ind. App. 175, 53 N. E. 444.

²⁹ *McFarlane v. Foley*, 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. 264.

³⁰ *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314. See § 15.

³¹ *Baylies v. Sinex*, 21 Ind. 45.

³² *Stephens v. Duffey*, 41 Ind. App. 385, 83 N. E. 268. See § 14.

³³ *Siegmund v. Kellogg, etc., Co.*, 38 Ind. App. 95, 77 N. E. 1096.

³⁴ *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333.

³⁵ *Haskell v. Gallagher*, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. 250.

³⁶ *Parker Land, etc., Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848.

³⁷ *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518.

³⁸ *Townsend v. Cleveland Fireproofing Co.*, 18 Ind. App. 568, 47 N. E. 707; *Parke County v. O'Connor*, 86 Ind. 531, 44 Am. Rep. 338; *Secrist v. Delaware Co.*, 100 Ind. 59.

³⁹ *Pike County v. Norrington*, 82 Ind. 190.

5. *Contract.*

While the statute nowhere uses the words that the material must be furnished, or the work done, under contract, yet the courts recognize the fact that in order to acquire a lien for the erection of buildings, there must be a contract with the owner of the land, or some one authorized to act for him.⁴⁰ Without proof that there was a valid and binding contract, there can be no lien.⁴¹ This is true, although the lien exists, by virtue of the statute creating it.⁴²

6. *Contract with owner.*

The contract must be with the owner of the land upon which the structure is erected, or some one having authority from the owner. "Owner" here, signifies the person who has some title or claim in the real estate. The fact that the owner knows that persons are performing labor on a building is not necessarily sufficient to imply a contract on his part.⁴³ Though an owner who offers another person facilities for making improvements on his land may be estopped as against laborers and material men, to deny his liability for their cost.^{43a} A married woman has the same power to make contracts for improvement of her real estate, as if she were single.⁴⁴ A husband has no authority to charge his wife's real estate, merely by virtue of the marriage relation,⁴⁵ although agency

⁴⁰ Coburn v. Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218. See § 25.

⁴¹ Littler v. Friend, 167 Ind. 36, 78 N. E. 238; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418.

⁴² Beach v. Huntsman, Ind. App., 85 N. E. 523.

⁴³ Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Caylor v. Thorn, 125 Ind. 201, 25 N. E. 217; Williamson v. Shank, 41 Ind. App.

513, 83 N. E. 641. See §§ 26, 27.

^{43a} Lengelsen v. McGregor, 162 Ind. 258, — N. E. —; Cannon v. Helfrick, 99 Ind. 164; Thompson v. Shepard, 85 Ind. 352; Jones v. Pothast, 72 Ind. 158.

⁴⁴ Stephenson v. Ballard, 82 Ind. 87.

⁴⁵ Johnson v. Tutewiller, 35 Ind. 353; Capp v. Stewart, 38 Ind. 479; Crickmore v. Breckenridge, 51 Ind. 294. See § 37.

of the husband may be shown as in other cases.⁴⁶ Tenants by entirety may subject their interest in the land to the lien.⁴⁷ While an infant may have sufficient title, yet he can plead infancy and defeat the lien,⁴⁸ building material not being "necessary" for an infant. A tenant owning the building, with the right of removal can create a lien thereon.⁴⁹ A purchaser of real estate in possession under contract of purchase and title bond, can not defeat the vendor's title by permitting a lien on the property.⁵⁰

7. *Estate or interest.*

Whatever estate or interest the person making the contract has in the land upon which the structure is to be located, that interest is subject to the lien.^{50a} If the contracting owner has only a leasehold interest, then the lien will attach to the building, and the lessor's interest.^{50b} As a general rule, however, a lien attaches to the building and the land, considered as one. If the building is destroyed, this does not defeat the right of the lienholder to have applied on his lien the interest that the contracting owner had in the land, be that great or small.⁵¹ In order that one who does not own the fee in the land, may create a lien on the building, so that it can be sold and re-

⁴⁶ Jones v. Pothast, 72 Ind. 158; Thompson v. Shepard, 85 Ind. 352. See §§ 30, 40.

⁴⁷ Taggart v. Kem, 22 Ind. App. 271, 53 N. E. 651.

⁴⁸ Price v. Jennings, 62 Ind. 111; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418. See § 29.

⁴⁹ McCarty v. Burnet, 84 Ind. 23.

⁵⁰ Rusche v. Pittman, 34 Ind. App. 159, 72 N. E. 473. See Williamson v. Shank, 41 Ind. App.

513, 83 N. E. 641, and dissenting opinion therein. And see Lengersen v. McGregor, 162 Ind. 258, holding that the owner may be estopped to deny the authority of his vendee to improve the land and to bind the fee for the cost of improvements.

^{50a} Williamson v. Shank, 41 Ind. App. 513, 83 N. E. 641.

^{50b} Littler v. Friend, 167 Ind. 36, 78 N. E. 238.

⁵¹ Bratton v. Ralph, 14 Ind. App. 153, 42 N. E. 644.

moved, such person must have come rightfully into possession.⁵²

8. *Separate and joint liens.*

This means that the mechanic or persons furnishing material, may either alone or jointly with others have a lien on the real estate. It does not mean that they can in the same notice of lien or proceedings have their lien attached to separate buildings, constructed under separate contracts. As to separate buildings, there must be a separate proceeding for each.⁵³ Of course if one building is properly appurtenant to another, the lien will cover both.⁵⁴ It has also been held, that parties can join in taking out a lien only when the contract is a joint one. If the claims are due to them, severally, each must take out his own lien.⁵⁵

9. *Extent of land included.*

The extent of land included is that usually considered by the owner as one separate parcel of land, or what might be considered the lot, or sub-division of land upon which the building is erected.⁵⁶

10. *Builder's bond.*

A builder's bond to secure the owner against mechanics' liens makes the sureties absolutely liable to laborers and material men, whether they ever perfect their liens by filing no-

⁵² Williamson v. Shank, 41 Ind. App. 513, 83 N. E. 641; Littler v. Friend, 167 Ind. 36, 78 N. E. 238.

See § 11.

⁵³ Hill v. Braden, 54 Ind. 72; Hill v. Ryan, 54 Ind. 118; McGrew v. McCarty, 78 Ind. 496.

⁵⁴ Crawford v. Anderson, 129

Ind. 117, 28 N. E. 314; Windfall N. G. Co. v. Roe (Ind. App.), 85 N. E. 722.

⁵⁵ McGrew v. McCarty, 78 Ind. 496; Northwestern, etc., Ass'n v. McPherson, 23 Ind. App. 250.

⁵⁶ Crawfordsville v. Barr, 65 Ind. 367. See § 134.

tices or not, if it contains an unconditional undertaking to "promptly pay and discharge" claims of that character.^{56a}

§ 46. **Claim for wages—Indiana statute.**—The provision relative to wages seems to be a separate and independent provision of the statute, and no doubt relates only to mechanics and laborers, as those terms are generally used, and limits the lien to such as are employed about any shop, mill, ware-room, store-room, manufactory or structure, and it makes these claims preferred ones. The lien does not extend to the real estate, but is limited to the machinery, tools, stock of material, work finished, or unfinished, located in and about such place where the work was performed, and this lien attaches whether a notice be filed or not, if the debtor is in failing circumstances.⁵⁷

§ 47. **Material men entitled to lien by direct contract.**—One who furnishes lumber for the building,¹ or mantels, tiles and grates,² or door sashes, whether he makes or buys them, is a material man,³ but a person who furnishes such material is not an "artisan," "builder" or "mechanic,"⁴ nor a "mason" or "carpenter,"⁵ nor a "laborer" or "contractor,"⁶ nor an "under-

^{56a} *Gwinn v. Wright* (Ind. App.), 86 N. E. 453.

⁵⁷ *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583; *National Supply Co. v. Stranahan*, 161 Ind. 602, 69 N. E. 447; *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770.

¹ *Alabama*.—*Geiger v. Hussey*, 63 Ala. 338.

Missouri.—*Miller v. Whitelaw*, 28 Mo. App. 639; *Gruner, etc., Lumber Co. v. Nelson*, 71 Mo. App. 110.

Pennsylvania.—*Savoy v. Jones*, 2 Rawle (Pa.) 343.

Rhode Island.—*Sweet v. James*, 2 R. I. 270.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 82.

² *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. 354.

³ *Wilson v. Hind*, 113 Cal. 357, 45 Pac. 605.

⁴ *Duncan v. Bateman*, 23 Ark. 327, 79 Am. Dec. 109; *Boutner v. Kent*, 23 Ark. 389; *Huck v. Gaylord*, 50 Tex. 578.

⁵ *Pitts v. Bomar*, 33 Ga. 96.

⁶ *Arnold v. Budlong*, 11 R. I. 561.

taker,"⁷ nor a "journeyman,"⁸ nor a "builder,"⁹ nor a "machinist,"¹⁰ nor a "contractor" or "subcontractor," within these terms as used in the statute.¹¹ The material man must bring himself within the general rules relating to liens. He can have no lien unless there was a contract with the owner.¹² Non-residence will not defeat his right.¹³ Even if there is no direct contract with the owner, the owner may so act that a contract may be implied, as where he promises to pay for materials which the contractor has requested the material man to furnish.¹⁴ And the material man may by his acts be estopped from asserting the lien.¹⁵

§ 48. **Contractors—Who are.**—The term contractor and general contractor, as used in mechanic's lien laws, include all persons furnishing material for, or doing labor upon, a building or construction under a contract made by such person directly with the owner or his authorized agent.¹ Where the statement shows that a large number of the articles and materials

⁷ *Greenwood v. Tennessee Mfg. Co.*, 32 Tenn. (2 Swan) 130.

⁸ *Stevens v. Wells*, 36 Tenn. (4 Sneed) 387.

⁹ *Darlington-Miller Lumber Co. v. Lobitz*, 4 Okla. 668, 46 Pac. 481.

¹⁰ *Allman v. Corban*, 63 Tenn. (4 Baxt.) 74.

¹¹ *Letch v. Central Dispensary. etc.*, Hospital, 6 App. D. C. 247.

¹² *Caulfield v. Polk*, 17 Ind. App. 429, 46 N. E. 932; *Ryan Drug Co. v. Rowe*, 66 Minn. 480, 69 N. W. 468; *Hatch v. Coleman*, 29 Barb. (N. Y.) 201.

¹³ *In re Simonds Furnace Co.*, 61 N. Y. Supp. 974, 30 Misc. (N. Y.) 209; (*Citing Campbell v. Coon*, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410); *Stout v. Sawyer*, 37 Mich. 313; *Genest v. Las*

Vegas Masonic Bldg. Assn., 11 N. M. 251, 67 Pac. 743.

¹⁴ *Getz v. Brubaker*, 17 York (Pa.) 81, 84, 121, 122; *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352; *Lane, etc., Co. v. Jones*, 79 Ala. 156; *Blake v. Pitcher*, 46 Md. 453. The fact that the contractor agreed with the owner to give security against liens, will not defeat his right. *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066.

¹⁵ *Green Bay Lumber Co. v. Adams*, 107 Iowa 672, 78 N. W. 699; *Vordenbaumen v. Bartlett*, 105 La. 752, 30 So. 219; *Cline v. Shell*, 43 Ore. 372, 73 Pac. 12.

¹ *Chapman v. Faith*, 18 Pa. Super. Ct. 578; *Merchants, &c. Bank v. Dashiell*, 25 Gratt. (Va.) 616; *Hoatz v. Patterson*, 5 Watts

entering into the construction of the various parts of a building were furnished by a person through his skilled workmen, such person is a contractor.² One of the essentials distinguishing a contractor from those entitled to liens under him, is that the relation of debtor and creditor must exist between him and the owner.³ It is not necessary that the contractor should actually perform the labor himself or furnish the material; it is sufficient if it is furnished by him directly, or by others at his order.⁴ A contractor, however, is not included in a law that gives the right to "master builders,"⁵ nor to "subcontractors,"⁶ nor to "mechanics" or "material men,"⁷ nor to "carpenters"

& S. (Pa.) 537. One who contracts to furnish an engine to be placed in a lighting plant constructed by a private individual on his own land, to be conveyed to the city when the plant is completed, is a contractor, within Mechanics' Lien Law (Hurd's Rev. St. 1899, p. 1104, 1), giving contractors a lien for machinery and materials used in erecting buildings on land, and it is not necessary that notice of the lien should be given when suit is begun within four months after the debt is due, as provided by section 7. *City of Salem v. Lane & Co.*, 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481. Under Rev. St. 1889, § 6705, giving a lien to every person who performs any work or furnishes any material for any building under a contract with the owner, his contractor, or a subcontractor, a contractor is not solely one who furnishes labor alone, or labor and material, under a contract with the owner, but includes one who furnishes material only un-

der a contract with the owner. *Western Sash & Door Co. v. Buckner*, 80 Mo. App. 95, 2 Mo. App. Repr. 549. In *Duff v. Hoffman*, 63 Pa. St. 191, a contractor is defined to be a person employed to erect or construct a building or any main division thereof, and, of course, where a lien is allowed for work or materials, for the repair or alteration of the same. A contractor is not a mere workman nor a material man. *Brown v. Cowan & Steele*, 110 Pa. St. 59.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 85.

² *Sterner v. Haas*, 108 Mich. 488, 66 N. W. 348.

³ *Lester v. Houston*, 101 N. Car. 605, 8 S. E. 366.

⁴ *Savannah & Co. R. Co. v. Calahan*, 49 Ga. 506; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712.

⁵ *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 14 L. ed. 487; Act Cong. 1833, § 1233.

⁶ *Bryan v. Whitford*, 66 Ill. 33.

⁷ *Witman v. Walker*, 9 Watts & S. (Pa.) 183.

and "lumber merchants."⁸ A contractor is not deprived of his right to a lien under a statute denying liens where the relation of landlord and tenant exists, by reason of the fact that he is designated as a tenant in the contract.⁹ If a contractor adopts the work of a third person and the owner assents thereto, the contract will be sufficient to give a lien.¹⁰ A contractor may be a material man so far as the lien relates to the materials he furnished, but generally he takes a certain part or portion of the entire work. He may contract to furnish all the lumber, or all the services for certain things, or for the entire improvement. In each of these cases a contractor has a lien for the portion covered by his contract.¹¹ In cases where the contractor has a lien right, the effect of the subordinate liens is to diminish the amount coming to him upon the performance of the contract.¹² It is impliedly agreed under a contract be-

⁸ Act Cong. 1843; *Shaefer v. Hull*, 3 Pa. L. J. 320; *Ross v. Hunter*, 3 Brewst. (Pa.) 169.

⁹ *Bentley v. Adams*, 92 Wis. 386, 66 N. W. 505; *Laws Wis.* 1887, § 466.

¹⁰ *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815.

Promoter.—A promoter of a scheme to erect a butter factory entered into a contract with a number of persons, severally, that he would erect a factory costing a certain amount, the subscribers to the scheme to take each a certain number of shares at \$100 a share, and when a sufficient number of shares were subscribed to cover the cost of the factory, then a corporation would be formed and the shares conveyed to it, with the proviso, however, that each subscriber should be held liable only for the amount of his subscription. A sufficient

number of shares having been subscribed, the factory was erected, and conveyed to the corporation formed, but, several of the subscribers refusing to pay, from whom nothing could be collected by law, the sum realized from the subscriptions was insufficient to pay for the factory. The contractors thereupon attempted to secure a mechanic's lien on the factory, and brought suit to enforce the same. The contractors under the contract were not entitled to a mechanic's lien. *Burnap v. Sylvania Butter Co.*, 12 Ohio Cir. Ct. 639, 1 Ohio Cir. Dec. 582.

¹¹ *Collini v. Nicholson*, 51 Ga. 560; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272.

¹² *Sweet v. James*, 2 R. I. 270.

tween the owner and the contractor that he may employ the necessary workmen or furnish the necessary materials, and the law becomes a part of this contract giving workmen under him a lien for materials furnished or services rendered.¹³ In the absence of conflicting claims between the person who actually performed the labor, and the person, who under the contract,¹⁴ caused it to be performed, the latter is given the lien. The fact that the contractor has assigned the payments due or to become due, will not defeat his right to a lien.¹⁵ Neither will the failure to secure a building permit, where the same is required, defeat his right.¹⁶ As before stated, to entitle a person to a lien it is not necessary that he contract to build the entire structure.¹⁷ One who is not a party to the contract but guarantees that the contractor will comply with his contract, is not a contractor, and cannot claim to be subrogated to the rights of the contractor and secure a lien.¹⁸ The fact that the contractor has given a bond conditioned to keep the building free from liens, will not prevent his lien. Such a bond is intended to mean that it be kept free from the liens of sub-contractors, and does not affect the rights of the contractor and owner.¹⁹

§ 49. Contractor, performance of contract.—Before a contractor is entitled to recover on his lien he must show a performance of the conditions of his contract. A substantial compliance, however, is all that is required.¹ What will con-

¹³ *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013.

¹⁴ *Bates Mach. Co. v. Trenton &c. R. Co.*, 70 N. J. L. 684, 58 Atl. 935.

¹⁵ *Williams v. Weinbaum*, 178 Mass. 238, 59 N. E. 626.

¹⁶ *Duhrkop v. White*, 44 N. Y. Supp. 694, 15 App. Div. (N. Y.) 613.

¹⁷ *Church v. Smitheas*, 4 Colo. App. 175, 35 Pac. 267; *Walden v.*

Robertson, 120 Mo. 38, 25 S. W. 349; *Schenck v. Uber*, 81 Pa. St. 31.

¹⁸ *Dye v. Forbes*, 34 Minn. 13, 24 N. W. 309.

¹⁹ *Atlantic Coast Brewing Co. v. Clement*, 59 N. J. L. 438, 36 Atl. 883.

¹ *Hobart v. Reeves*, 73 Ill. 527; *King v. Moore*, 61 App. Div. (N. Y.) 609, 70 N. Y. Supp. 6; *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y.

stitute a substantial performance, is a matter of fact for the jury to decide from all the facts and circumstances of the case.² If the claimant shows that he offers to do any work designated by the owner that ought to be done, and the owner fails to

Supp. 522; *Rogers v. McGuire*, 57 Hun (N. Y.) 590, 10 N. Y. Supp. 831; *McNeal v. Clement*, 2 Th. & C. (N. Y.) 363.

Failure to furnish dimensions.

—Where plaintiff completed his contract to furnish materials for defendant's buildings, except certain doors and drawers, the dimensions of which were not furnished to him, he being at all times ready to supply them when he could receive the dimensions, his right to a lien is complete. *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034, 8 Det. Leg. N. 458.

Good faith an element.—"The question of substantial performance depends somewhat on the good faith of the contractor. If he had intended, and tried to comply with the contract, and has succeeded except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission. But when, as in this case, there is a wilful refusal by the contractor to perform his contract, and he wholly abandons it, and, after due notice, refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an

allowance of damages if he had acted in good faith." *Van Cleaf v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095; *Roane v. Murphy* (Tex. Civ. App.) 96 S. W. 782; *Hahn v. Bonacum*, 76 Neb. 837, 107 N. W. 1001, judgment modified on rehearing (Neb.) 109 N. W. 368.

Easthampton Lumber, etc., Co. v. Worthington, 186 N. Y. 407, 79 N. E. 323; Judgment in 108 App. Div. (N. Y.) 355, 95 N. Y. Supp. 1126 reversed. See § 50, Ohio statutes.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 93.

² **Maine.**—*White v. Oliver*, 36 Me. 92; *Jewett v. Weston*, 11 Me. 346.

Massachusetts.—*Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Hayward v. Leonard*, 7 Pick. (Mass.) 181.

New York.—*Nolan v. Whitney*, 88 N. Y. 648; *Ansonia Brass & Copper Co. v. Gerlach*, 8 Misc. (N. Y.) 256, 28 N. Y. Supp. 546; *Nunan v. Doyle*, 60 N. Y. Super. 377, 18 N. Y. Supp. 192; *Phillip v. Gallant*, 62 N. Y. 256. In the case of *Kane v. Stone Co.*, 39 Ohio St. 1, the court below charged the jury, "Plaintiff must show that Scott (contractor) substantially complied with the terms of the contract, and unless he substantially completed the contract, the

designate any,³ or that the owner has accepted the building, knowing the defects complained of, then the owner will be estopped from setting up the defense of non-performance.⁴ While the courts have from the apparent injustice of a contrary holding, decided that a substantial compliance will be sufficient to

plaintiff cannot recover. But this is not a technical rule. It does not apply to immaterial points, but to the substantial requirements of the contract. If the work was substantially completed, then the plaintiff is entitled to recover as much as the materials and work were worth, after deducting all damages which Kane (owner) sustained by reason of defects in the materials or work and for which Kane was liable to Otis. If Scott did not complete it, but abandoned it before finishing in a material part, then the plaintiff cannot recover. If he did all the work, but in an improper manner, then plaintiff can recover the reasonable value of such work less any damage caused by the improper manner of doing it." In *Gillespie Tool Co. v. Wilson*, 22 W. N. C. (Pa.) 522, the court said: "The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent or unimportant omission or defect. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omis-

sion or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury." The contract in this case called for the drilling of a gas well of five and one-eighth inches in diameter, reamed out to eight inches for 400 feet in depth, and if salt water was found below that depth, then to be reamed out to a depth necessary to shut it off. The contractor encountered salt water at a depth of 1729 feet, and to shut off, in place of reaming out the wall, inserted a casing inside the five and five-eighths-inch casing and made the remainder of the well four and one-half inches in diameter. In a suit on the contract, the defense being non-compliance, held that it was no answer to the defence to show that for the purpose of testing gas property a small well is as good as a large one. See article in 19 Cent. L. J. 442, on substantial performance of contracts. *Robock v. Peters*, 13 Manitoba 124.

³ *Dennis v. Walsh*, 16 N. Y. Supp. 257; *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936.

⁴ *Haller v. Clark*, 21 D. C. 128; *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936; *Gier v. Daiber*, 148 Mich. 190, 111 N. W. 773, 14 Det. Leg. N. 183.

allow a contractor to recover, yet he can only recover the contract price, less a proper deduction for work left undone.⁵ If the contract authorizes the owner to complete the work on the neglect or refusal of the contractor so to do, and the owner completes the work, this will not defeat the contractor's right to recover a balance that may be due on the contract after deducting the cost of completion.⁶ Unless time be made of the essence of the contract, failure to complete within a stipulated time will not defeat recovery for a substantial performance.⁷ If a contract is to be performed to the satisfaction of the architect,⁸ or owner, such satisfaction must be shown.⁹ However, neither the owner,^{9a} nor the architect can act unjustly or capriciously in such a matter. There must be some substantial reason to justify a rejection of the work.¹⁰ If the owner failed to furnish materials as agreed, and for that reason the work is not completed,¹¹ or it is abandoned by him,¹²

⁵ *Moore v. Dugan*, 179 Mass. 153, 60 N. E. 488; *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522; *Bates v. Trustees of Masonic Hall, &c., Fund*, 7 Misc. (N. Y.) 609, 27 N. Y. Supp. 951; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243, 29 W. N. C. 274; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095.

⁶ *McGrath v. Horgan*, 72 App. Div. (N. Y.) 152, 76 N. Y. Supp. 412.

⁷ *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5; *Heckmann v. Pinkney*, 81 N. Y. 211; *Phillip v. Gallant*, 62 N. Y. 256; *Elsendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22; *Jones on Liens*, § 1599.

⁸ *Illinois*.—*Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Ewing v. Fiedler*, 30 Ill. App.

202; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178.

Wisconsin.—*Boden v. Maher*, 95 Wis. 65, 69 N. W. 980; *Forster Lumber Co. v. Atkinson*, 94 Wis. 578, 69 N. W. 347; *Hudson v. McCartney*, 33 Wis. 331.

⁹ *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178.

^{9a} *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936; *Mindeman v. Douville*, 112 Wis. 413, 88 N. W. 299.

¹⁰ *Wendt v. Vogel*, 87 Wis. 462, 58 N. W. 764; *Gier v. Dalber*, 148 Mich. 190, 111 N. W. 773, 14 Det. Leg. N. 183.

¹¹ *Pacific Rolling Mill Co. v. Bear Valley Irr. Co.*, 120 Cal. 94, 52 Pac. 136, 65 Am. St. 158n; *Busfield v. Wheeler*, 96 Mass. (14 Allen) 139.

¹² *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016.

or changed by mutual consent, the contractor's rights will not be affected.¹³ If, however, the owner rescinds the contract before any work is done, no right to a lien will exist. In such cases the contractor's remedy is for breach of the contract.¹⁴ If he has commenced his work before the owner rescinds the contract,¹⁵ or the owner fails to perform his part of the contract,¹⁶ or the work is suspended by fault of the owner, he may have his lien for the work performed.¹⁷ However, failure to make payments as required in the contract will not justify the contractor in abandoning his contract unless such payments are made a condition precedent to the performance of the work.¹⁸ Generally, however, a workman or contractor who undertakes to perform the entire contract cannot, without some

¹³ *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522. Where the tenant contracted to put in an elevator, and took out an old one, and partly put in a new one, the contractor had no lien. *New York Elevator Supply, &c. Co. v. Bremer*, 74 App. Div. (N. Y.) 400, 77 N. Y. Supp. 509.

¹⁴ *Horr v. Slavik*, 35 Ill. App. 140; *McLagan v. Brown*, 11 Ill. 519.

¹⁵ *Vail v. Meyer*, 71 Ind. 159; *Howes v. Reliance Wire-Works Co.*, 46 Minn. 44, 48 N. W. 448; *Justice v. Elwert*, 28 Ore. 460, 43 Pac. 649.

¹⁶ *Smith v. Norris*, 120 Mass. 58. Pay for work as agreed. *Hunter v. Walter*, 58 Hun. (N. Y.) 607, 12 N. Y. Supp. 60.

Destroyed by wind.—The defendant, having employed a third person to erect the walls of a brick building, contracted with the plaintiff to do the carpenter work and furnish the materials therefor, from time to time as the

walls progressed, for a certain sum; the plaintiff being entitled to receive payments on account from time to time for the work already done, upon estimates to be furnished by the architect and presented to the defendant. A part of the work having been done, and an estimate duly made by the architect, the plaintiff demanded payment, which was refused by the defendant. The building was destroyed shortly afterwards by a gale of wind; the plaintiff, being justified in abandoning the contract, was entitled to enforce a mechanic's lien for the work done. *Schwartz v. Saunders*, 46 Ill. 18.

¹⁷ *Howes v. Reliance Wire-Works Co.*, 46 Minn. 44, 48 N. W. 448; *Knight v. Norris*, 13 Minn. 473; *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.) 729.

¹⁸ *Geary v. Bangs*, 33 Ill. App. 582; *Wright v. Reusens*, 15 N. Y. Supp. 504, 590, 60 Hun (N. Y.) 585 (without opinion); *McGrath*

cause, quit his work and recover on his contract.¹⁹ The sale of the premises is not sufficient cause.²⁰ If he offers to perform the work and is prevented,²¹ by the owner,²² who refuses to allow him to proceed, his right will not be defeated.²³ Of course if a contract is cancelled by mutual consent, the lien is lost.²⁴ An explicit stipulation in the contract that the contractor will assert no lien, will bind him.²⁵ But the right of a contractor to a lien will not be defeated by a stipulation that he will promptly pay for all materials,²⁶ or will give security that no liens shall be filed,²⁷ or that the building shall be delivered free from liens, or that all bills shall be paid by check of the contractor,²⁸ or that the contractor shall satisfy all claims,²⁹ or that the contractor shall not permit any liens to be set up by sub-contractors.³⁰ Slight modifications in the manner of

v. Horgan, 72 App. Div. (N. Y.) 152, 76 N. Y. Supp. 412; Condon v. Church of St. Augustine, 98 N. Y. Supp. 253, 112 App. Div. (N. Y.) 168.

¹⁹ Thomas v. Illinois Industrial University, 71 Ill. 310; Kinney v. Sherman, 28 Ill. 520; Bohem v. Seabury, 141 Pa. St. 594, 21 Atl. 674; Rochford v. Rochford, 192 Mass. 231, 78 N. E. 454.

²⁰ Cohn v. Wright, 89 Cal. 86, 26 Pac. 643.

²¹ Hutchins v. Bautch, 123 Wis. 394, 101 N. W. 671, 107 Am. St. 1014.

²² Sproessig v. Keutel, 17 N. Y. Supp. 839.

²³ Charnley v. Honig, 74 Wis. 163, 42 N. W. 220.

²⁴ Bruce v. Lennon, 52 Minn. 547, 54 N. W. 739; Murphy v. Buckman, 66 N. Y. 297. Where the owner abandons the contract the contractor may recover on a quantum meruit. Powers v. Horgan, 67 How. Pr. (N. Y.) 255.

²⁵ Barker v. Berry, 4 Mo. App. 585; Brydon v. Lutes, 9 Manitoba 463.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 90.

²⁶ Zarrs v. Keck, 40 Neb. 456, 58 N. W. 933.

²⁷ Young v. Lyman, 9 Pa. St. 449.

²⁸ Schmid v. Palm Garden Imp. Co., 162 Pa. St. 211, 29 Atl. 727, 34 W. N. C. (Pa.) 461; Ritchie v. Grundy, 7 Manitoba 532; Lowenstein v. Reynolds, 92 Tenn. 543, 22 S. W. 210.

²⁹ Childress v. Smith (Tex. Civ. App.) 37 S. W. 1076; Anly v. Holy Trinity Church, 2 Manitoba 248.

³⁰ Colorado.—Aste v. Wilson, 14 Colo. App. 323, 59 Pac. 846; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129.

Kansas.—Clough v. McDonald, 18 Kan. 114.

Maine.—Morton v. Clark, 85 Me. 357, 27 Atl. 252.

the execution of the contract will not destroy the right to a lien,³¹ especially if the owner has assented thereto.³²

§ 50. Remedy where owner suspends work. Ohio statute.

—Section 3205 of the Ohio statutes provides that if the progress of completion of the work on any property designated in this chapter, be suspended by the default or decease of its owner, without consent of such head or subcontractor, or material man, he or they, or any of them, may proceed with the work, in accordance, however, with the terms of the original plan or contract, and on completion thereof, have either or all the remedies provided by this chapter.³³

§ 51. Construction of the Ohio statute.—The supreme court of Ohio has said that, "The terms of this section are plain and need no construction."¹ The court continuing, says, "If the work be suspended by the decease of the owner of the property, and such suspension is without the consent of the head contractor, or of the subcontractor, or of the material man, he or they, or any of them not consenting to the suspension, may proceed with the work in accordance with the original plan or contract, and, on the completion thereof, such person or persons may have, either or all of the remedies provided in the mechanics' lien act." Such lien precedes that of a judgment creditor of a devisee.²

Montana.—*Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393.

Pennsylvania.—*Schmid v. Palm Garden Imp. Co.*, 162 Pa. St. 214, 29 Atl. 727; *Lucas v. O'Brien*, 159 Pa. St. 535, 28 Atl. 364; *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131, 36 Am. St. 30; *Nice v. Walker*, 153 Pa. St. 123, 35 Atl. 1065, 34 Am. St. 688.

³¹ *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84.

³² *Hough v. Collins*, 176 Ill. 188, 52 N. E. 847; *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. 1134; *Sweatt v. Hunt*, 42 Wash. 96, 84 Pac. 1.

³³ 74 Gen. Laws, p. 168, sec. 18 (S. & C. 835).

¹ *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228.

See § 64.

² *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228.

§ 52. Construction of Ohio statute; rights of subcontractor.

—It will be observed that this section makes provision only for cases where the work is suspended by the death or default of the owner. If the contractor abandons the contract the subcontractor is not entitled to complete the work against the owner's wish.³ Where the owner dies, the subcontractor or material man should separate his lien and file one for the work done or material furnished before the death, and one for work done after the death.⁴ The rights of the subcontractor become fixed at the time of the death of the head contractor.⁵ If sureties on a contract complete the contract to save themselves, there being no objection on the part of the owner, they will be entitled to protection.⁶

§ 53. Lien to persons not under direct contract with the owner.—When the statutes were first passed creating the right to mechanics' liens they were confined not only to particular persons but likewise required that the person to whom the right was given should have made a contract with the owner. Afterwards for reasons which were no doubt along the same line that caused the original passage of the law, the scope was extended to include persons who were not under a direct contract with the owner.¹ Some courts assign as the reason for

³ *Sturm v. Ritz*, 7 Ohio Dec. (Re.) 135, 1 Ohio L. Bull. 150.

⁴ *Williams v. Webb*, 2 Disney (Ohio) 430.

⁵ *Bergin v. Braun*, 15 Ohio Dec. 383, 3 Ohio N. P. (N. S.) 150.

⁶ *Port Clinton v. Cleveland Stone Co.*, 6 Ohio Cir. Dec. 218, 10 Ohio C. C. 1.

¹ *Connecticut*.—*Spaulding v. Thompson Ecclesiastical Soc.*, 27 Conn. 573.

Missouri.—*Kling v. Railway Const. Co.*, 4 Mo. App. 574; *Western Sash, etc., Co. v. Buckner*,

80 Mo. App. 95, 2 Mo. App. Repr. 549.

New York.—*Pendleburg v. Meade*, 1 E. D. Smith (N. Y.), 728; *Dixon v. La Farge*, 1 E. D. Smith (N. Y.), 722; *Haswell v. Goodchild*, 12 Wend. (N. Y.), 373; *Broderick v. Poillon*, 2 E. D. Smith (N. Y.) 554. The statute provides that any person who shall furnish any such material under contract with the contractor may obtain a lien. This means more than that an ordinary contract shall exist between the sell-

this that there was a tendency of land-owners to enter into contracts at a figure so low that the original contractor could make no profit, unless he refused to pay his employees and therefore to prevent this fraud the scope of the act was extended.² But while this may have been a reason the law is no doubt based largely upon the equitable principle that a man's labor or his money having gone into the property of another, such property should be held liable to pay for the same. However, all these statutes have provided,—although in different forms,—that the person asking a lien who was not in privity of contract with the owner must work out his rights through the contract made between a person termed the "principal contractor," and the owner. All persons who are entitled to a lien and not being under direct contract with the owner, in some sense, may be said to be subcontractors, although by reason of the particular services or duties they may perform, they may also sometimes be called material men and laborers. A subcontractor is defined as one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance; and the subcontract as "a contract by one who has contracted for the performance of labor or services, with a third party for the whole or part performance of that labor or service."³ The basis of these laws may be said to be one of agency. The owner at the time he makes the contract for the erection of the building is presumed to know that

er and purchaser that the purchaser shall pay the contract price. It means that the subcontractor shall contract with reference to the original contract; that is, he must have knowledge of such original contract, and that the material to be furnished is to go to the betterment of some particular estate. *James v. Hayes*, 63 Kan. 133, 65 Pac. 241.

² *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 94.

³ *California*.—*Davis v. Livingston*, 29 Cal. 283.

Delaware.—*Travis v. Meredith*, 2 Marv. (Del.) 376, 43 Atl. 176.

Illinois.—*Shaar v. Knickerbocker Ice Co.*, 149 Ill. 441, 37 N. E. 54.

necessarily the contractor can not do all of the work himself, and he therefore impliedly agrees that the contractor may get the necessary things that he cannot furnish himself, and hence his property is justly bound for payment of the same. These laws have been held constitutional in a number of cases.⁴ Generally there need be no understanding that the persons furnishing the labor or material contemplate the filing of a lien.⁵ They may even not know that they have such a right,⁶ necessarily there is no privity of contract between the owner and the subcontractor.⁷ On the question as to whether the work is of a character that will give the lien, the same rules apply as are applied to contracts made direct by the owner.⁸ If the statute permits the owner to file his contract with the recorder and by that means escape liability to subcontractors, and he does not avail himself of this provision, he will be

Michigan.—Fuller v. Detroit Loan & Bldg. Assn., 119 Mich. 71, 77 N. W. 642.

Oregon.—Smith v. Wilcox, 44 Ore. 323, 74 Pac. 708.

The fact that a building contract in relation to property, held in the names of the individual partners, is made with the firm, does not show that the contractor was a subcontractor, the firm being the contractor. Hill v. Gray, 81 Mo. App. 456; Stroebel v. Ochse, 14 Misc. (N. Y.) 522, 35 N. Y. Supp. 1089; Vogel v. Whitmore, 72 Hun (N. Y.) 417, 25 N. Y. Supp. 202; Kahler v. Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160; Harbeck v. Southwell, 18 Wis. 419 [439].

⁴ Parker v. Bell, 7 Gray (Mass.) 429; Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Spofford v. True, 33 Me. 409; Colter v. Freese, 45 Ind. 96; White v. Miller, 18

Pa. St. 52; in which case Chief Justice Gibson delivered the opinion of the court; Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

⁵ Bassett v. Bertorelli, 92 Tenn. 548, 22 S. W. 423.

⁶ Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 48 N. W. 1071.

⁷ Spalding v. Dodge, 6 Mackey (D. C.) 289.

⁸ Siebrecht v. Hogan, 99 Wis. 437, 75 N. W. 71. See §§ 12-18.

Damages for enforced idleness.—Under the general laws relating to mechanics' liens, the subcontractor is not entitled to a lien upon the premises, nor action against the owner for damages and expenses incurred through idleness enforced by the default or negligence of the principal contractor. Tabor v. Armstrong, 9 Colo. 285, 12 Pac. 157.

liable.⁹ Death of the owner,¹⁰ or sale of the premises, will not defeat the subcontractor's rights.¹¹ If the work is performed on a public building which is not subject to a lien, the right will be transferred to the fund.¹² As a general rule it may be said that the labor or material must not be furnished upon the individual credit of the contractor,¹³ nor upon a false representation.¹⁴ The owner is not personally liable for the demand unless by his acts he makes himself liable.¹⁵ The owner's property is bound only when the subcontractor keeps within the scope of the principal contract.¹⁶

§ 54. Different systems for liens to persons not under direct contract.—The various laws relating to liens allowed to persons who do not sustain contractual relations with the owner, have divided themselves into two systems—the one giving a lien directly, and the other working through the contractor. The courts and text book writers have designated these the "New York" and "Pennsylvania" systems. In the working

⁹ Van Pelt v. Hartough, 31 N. J. L. (2 Vroom) 331; Tatum v. Cherry, 12 Ore. 135, 6 Pac. 715.

¹⁰ Watrous v. Elmendorf, 55 How. Pr. (N. Y.) 461.

¹¹ Mears v. Dickerson, 2 Phila. Pa. 12 (19). If the statute allows the owner to pay to subcontractor "what he thinks is due," the fact that the principal contractor has rejected the subcontractor's claim will not prevent his lien. Reeve v. Elmendorf, 38 N. J. L. (9 Vroom), 125.

¹² Coney v. Dorsey, 3 Ohio (N. P.) 162; Jewell County v. Snodgrass & Co. Mfg. Co., 52 Kan. 253, 34 Pac. 741.

¹³ Pacific Rolling Mill Co. v. Hamilton, 61 Fed. 476.

¹⁴ Where materials are obtained by a party on his falsely repre-

sending himself as the contractor or architect, the party furnishing the materials has no right to a lien, and, as it was his duty to know the relation of the alleged contractor to the owner, the loss should fall on him, rather than on an owner who has already paid for the materials and protected himself as much as possible. Brown v. Cowan, 110 Pa. St. 588, 1 Atl. 520; Siebrecht v. Hogan, 99 Wis. 437, 75 N. W. 31.

¹⁵ Morrison v. Hancock, 40 Mo. 561. See §§ 68, 69.

¹⁶ Seeman v. Biemann, 108 Wis. 365; 84 N. W. 490; Beach v. Stamper, 44 Ore. 4, 74 Pac. 208, 102 Am. St. 597; Knauft v. Miller, 45 Minn. 61, 47 N. W. 313; Larkins v. Blakeman, 42 Conn. 292.

out of the rights of the parties entitled to lien who are not contractors directly with the owner, under these two different systems, in matters requiring notice, different rules may prevail. Some states have at one time had one system and at another time the other.¹ "The New York" system gives to the subcontractor a lien by way of subrogation, as it is termed by the text writers, which is accomplished by a notice given to the owner by the subcontractor, which notice specifies the probable value of the services to be performed, or the materials to be furnished, and the owner is then required to withhold from the contractor money due to the latter to such an amount as will meet the demand. Under this system, if the principal contractor at the time notice is given is entitled to no lien, the subcontractor can have none.^{1a} It has been said, however, that this rule goes to the lienability of the claim and not to its enforcement.² The fact that the owner knows that the work is being done will not be sufficient.³ Where the contractor allows the owner to retain funds to pay the subcontractor, the owner can not refuse to do so, and if the contractor abandons his contract and the owner finishes it where the contract permits him to do so, the subcontractor will have his lien.⁴ Where a building is completed by sureties of the con-

¹ *Hunter v. Truckee Lodge*, 14 Nev. 24.

^{1a} *Illinois*.—*Von Platen v. Winterbotham*, 203 Ill. 198, 67 N. E. 843.

Louisiana.—*Schwartz v. Cronan*, 30 La. Ann. 993; *Baker v. Pagaud*, 26 La. Ann. 220; *First Municipality v. Bell*, 4 La. Ann. 121; *Whitla v. Taylor*, 6 La. Ann. 480.

New Hampshire.—*Cudworth v. Bostwick*, 69 N. H. 536, 45 Atl. 408.

New Jersey.—*St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 1037.

² *Seeman v. Blemann*, 108 Wis. 365, 84 N. W. 490.

³ *Butler v. Aquehonga Land Co.*, 86 App. Div. (N. Y.) 439, 83 N. Y. Supp. 874.

⁴ *Travis v. Smith*, 6 N. Y. 271; *Van Clief v. Van Vechten*, 55 Hun. (N. Y.) 467, 8 N. Y. Supp. 760. Under Ky. St. 2467 providing that no lien shall exist in favor of a subcontractor in case the contractor himself is not entitled to a lien, where the owner owed the principal contractor at the time the subcontractor's notice for lien was served, but afterwards resumed possession of the

tractor, their claim is subrogated to that of the contractor.⁵ The other system is the "Pennsylvania" system and gives a direct lien to the laborer or subcontractor, either by an agency created by the statute, or by an implied agency vested in the original contractor. Under the "New York" system the subcontractor cannot recover more than is due from the owner to the contractor, that is to say, he is bound by the original contract, while under the "Pennsylvania" system, the original contract, or payment of the original contractor is no defense to a claim of the subcontractor. Whatever sum is due the subcontractor, he has a direct lien therefor, and the lien of the principal contractor is subordinate thereto.⁷ Under this system of allowing direct liens, whatever the statute requires to be done must be done, and if an owner can escape liens of the subcontractor, by recording his contract and he fails to do so, his property will be bound.⁸ If notice is required to be given and it is not, there may be a direct lien under some statutes.⁹ The principle of agency generally applies to a direct lien.¹⁰

property because of the contractor's unnecessary delay in completing the work, and used the amount he owed the contractor in paying for finishing the work, as the contract stipulated he might do in that event, the subcontractor has no lien. *Watts v. Metcalf* (Ky.) 66 S. W. 824, 23 Ky. L. 2189.

⁵ *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 1037.

⁷ *Hunter v. Truckee Lodge*, 14 Nev. 41.

⁸ *California*.—*Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312; *Coss v. MacDonough*, 111 Cal. 662, 44 Pac. 325; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

Montana.—*Merrigan v. English*,

9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

Pennsylvania.—*Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 27 Atl. 895, 33 W. N. Cas. (Pa.) 244; *Willey v. Toppling*, 146 Pa. St. 427, 23 Atl. 335; *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632, 19 Am. St. 691; *White v. Miller*, 18 Pa. St. 52.

Tennessee.—*Green v. Williams*, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

⁹ *Ballou v. Black*, 21 Neb. 131, 31 N. W. 673. See § 45.

¹⁰ *Missouri*.—*Deardorff v. Everhartt*, 74 Mo. 37.

Nebraska.—*Pomeroy v. White Lake Lumber Co.*, 33 Neb. 243, 49 N. W. 1131; *Doolittle v. Goodrich*, 13 Neb. 296, 13 N. W. 400.

§ 55. **Contract where lien is not under direct contract with owner.**—While as shown in the previous sections, a lien may be worked out through the lien of a contractor yet in all cases this lien must have for its basis a contract between the owner and the principal contractor, otherwise there can be no lien.¹ No particular form is required for such a contract,² but it is well settled that the work done or materials furnished must be within the terms of the original contract.³ And it is pre-

Nevada.—*Hunter v. Truckee Lodge*, 14 Nev. 24.

Oregon.—*Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 305.

Pennsylvania.—*Brown v. Cowan*, 110 Pa. St. 588, 1 Atl. 520.

United States.—*Pacific Rolling Mill Co. v. Hamilton*, 61 Fed. 476.

There are two systems generally adopted throughout the United States—one known as the "New York System," the other as the "Pennsylvania System." The former gives to the subcontractor a lien by way of subrogation, as it is termed by the text writers, which is accomplished by a notice given to the owner by the subcontractor, which notice specifies the probable value of the services to be performed or of the materials to be furnished, and the owner is therefore entitled to withhold from the contractor money due to the latter to such an amount as will meet the demand. These are the general features of the New York system, and such was the system prevailing in this territory prior to March, 1887, as will appear from an inspection of sections 820 to 824, inclusive, of the Revised Statutes. The other, or Pennsylvania system, gives a

direct lien to the laborer or subcontractor, either by an agency created by the statute, or by an implied agency vested in the original contractor. * * * Under the New York system the subcontractor cannot recover more than is due from the owner to the contractor—that is to say, he is bound by the original contract, while under the other system the original contract, or payment to the original contractor, is no defense to a claim of a subcontractor. * * * Thus it will be seen the New York system, or the system generally known as that of "equitable subrogation," was the law regulating the liens of mechanics in this territory prior to the act of March, 1887. *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

¹ *Alderman v. Hartford & C. Transp. Co.*, 66 Conn. 47, 33 Atl. 589; *Consociated Presbyterian Soc. of Green's Farms v. Staples*, 23 Conn. 544; *Valley Lumber & Mfg. Co. v. Nickerson*, 13 Idaho 682; 93 Pac. 24.

² *Wilson v. Sleeper*, 131 Mass. 177.

³ *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71; *McCreary v. Bristol*, 97 Tenn. 469.

sumed that the subcontractor completes his work before the time fixed for the completion of the principal contract.^{3a} From the nature of the case an owner well knows that a principal contractor necessarily cannot do all the work nor furnish all the material required, hence the principal contract being shown, the consent of the owner to the principal contractor to purchase from a sub-contractor is implied.⁴ If there is no principal contract, the fact that the owner knew that the materials were being furnished will not be sufficient to fix the owner with the lien.⁵ If the statute requires that particular things be done by the owner, as for example, to accept in writing the contract of a subcontractor, an order drawn on the owner by the contractor and by him accepted will be a sufficient contract in writing to bring it within such statutory requirement.⁶ In New Jersey the statute makes the owner liable unless he files his contract with a public officer. In such cases it is not sufficient to file the contract in the name of the agent without disclosing the name of the owner.⁷ However, if it were properly filed the owner will not be liable.⁸ As a general rule the owner is not liable for more than was due the contractor at the time the lien became effective.⁹ One member of a firm can make a proper contract.¹⁰ An assignee of a contract to furnish material is entitled to a lien where the assignor has waived all his rights under the contract.¹¹ Statutes allowing the owner to escape

See Dec. & Am. Dig. tit. Mechanics' Liens, § 98.

^{3a} *Merritt v. Crane Co.*, 126 Ill. App. 337; judgment modified (Ill.) 80 N. E. 103.

⁴ *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Moore v. Erickson*, 158 Mass. 71, 32 N. E. 1031.

⁵ *Woodward v. McLaren*, 100 Ind. 586. Owner not personally liable. *Valley Lumber & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. 24.

⁶ *Hartford Building, etc., Assn. v. Goldreyer*, 71 Conn. 95, 41 Atl. 659.

⁷ *Willets v. Earl*, 53 N. J. L. 270, 21 Atl. 327.

⁸ *Earle v. Willets*, 56 N. J. L. 334, 29 Atl. 198. Plans must be filed. *Weaver v. Atlantic Roofing Co.*, 57 N. J. Eq. 547, 40 Atl. 858.

⁹ *Shulman v. Maison*, 25 Misc. (N. Y.) 765, 54 N. Y. Supp. 1009.

¹⁰ *Wahlstrom v. Trulson*, 165 Mass. 429, 43 N. E. 183.

¹¹ *Haney & Co. Mfg. Co. v. Adaza Co-Operative Creamery Co.*, 108 Iowa 313, 79 N. W. 79.

liability by recording a contract must be strictly complied with.¹² In such cases abandonment of the contract does not give a right to the lien.¹³ As a matter of course the filing of a contract only protects the owner as to materials furnished under that contract.¹⁴ And it should be filed before the work begins and if the specifications are necessary to give the material men full knowledge, they must be filed.¹⁵ The contract on file, must state the real contract.¹⁶

§ 56. **Notice to owner.**—In both of the systems before referred to it is required in some manner or method, that a lien shall not be put on a person's property without the owner having some knowledge of the liability to such a lien. These matters are variously set forth in different statutes. Under the New York system such notices are generally necessary and binding to prevent payments made to the principal contractor. Under the Pennsylvania system it is to notify the owner so that he may withhold payments that may be due the principal contractor.¹ If the subcontractor neglects to follow the statute

¹² *La Foucherie v. Knutzen*, 58 N. J. L. (29 Vroom) 234, 33 Atl. 203; *Budd v. Lucky*, 28 N. J. L. 484; *Freedman v. Sandkop*, 53 N. J. Eq. 243, 31 Atl. 232; *Scudder v. Harden*, 31 N. J. Eq. 503. Where owner buys material himself he is liable. *Mechanics' Mut. Loan Co. v. Alberton*, 23 N. J. Eq. 318. Likewise a purchaser, buying without knowledge. *Young v. Wilson*, 44 N. J. L. 157.

¹³ *Willets v. Earl*, 53 N. J. L. 270, 21 Atl. 327.

¹⁴ *Willets v. Earl*, 53 N. J. L. 270, 21 Atl. 327.

¹⁵ *La Foucherie v. Knutzen*, 58 N. J. L. 234, 33 Atl. 203; *Pimlott v. Hall*, 55 N. J. L. 192, 26 Atl. 94.

¹⁶ *Murphy-Hardy Lumber Co. v. Nicholas*, 66 N. J. L. 414, 49 Atl. 447.

California.—*West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533.

Colorado.—*Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786.

Illinois.—*Springer v. Bowerman*, 75 Ill. App. 352.

Texas.—*Padgett v. Dallas Brick & Const. Co.*, 92 Tex. 626, 50 S. W. 1010.

West Virginia.—*Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

¹ *City of Crawfordsville v. Brundage*, 57 Ind. 262; *Wheeler v. Pierce*, 167 Pa. 416, 31 Atl. 649, 46 Am. St. 679; *Sierra Nevada*

he has no lien.² Unless the statute so provides, this notice need not be in writing,³ but if required to be in writing it will not be valid if verbally given.⁴ Mere knowledge that material is being furnished will not displace the statutory requirements; actual notice must be given.⁵ A casual conversa-

Lumber Co. v. Whitmore, 24 Utah 130, 66 Pac. 779. See §§ 59, 81.

² *Robbins v. Blevins*, 109 Mass. 219; *Kinney v. Blackmer*, 55 Conn. 261, 10 Atl. 568. See Dec. & Am. Dig. tit. Mechanics' Liens, § 99. In order therefore to create a lien it is a fundamental requirement that the owner be notified as the statute requires, and while no particular form is prescribed, it must be some affirmative act or declaration which puts the owner on his guard, or advises him that the initiatory step to acquisition of a lien is being taken. *Neeley v. Searight*, 113 Ind. 316. Where a material man furnishing lumber to a contractor for the erection of a building, did not give notice to the owner at or before furnishing the material that he intended to avail himself of his right to a mechanic's lien therefor, and did not thereafter procure a written settlement of account certified by the contractor that it was just, etc., and file the same with the clerk of the circuit court, as required by Mansf. Dig. 4403, 4421 (Ind. T. Ann. St. 1899, 2870, 2888), he was not entitled to a lien. *Campbell v. William Cameron & Co.*, 5 Ind. T. 323, 82 S. W. 762. Under the mechanic's lien law, which does not limit the rights of a subcontractor to

the balance due the contractor at the time notice of lien is served, a subcontractor, by filing his claim and serving notice, is entitled to a lien for the full amount due him, of which he cannot be deprived by any adjustment between the owner and the original contractor. *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863.

Florida.—*Mulliken v. Harrison* (Fla.) 44 So. 426.

Ohio.—*Van Cleve Glass Co. v. Wamelink*, 10 Ohio Cir. Dec. 12.

Pennsylvania.—*Getz v. Brubaker*, 25 Pa. Super. Ct. 303; *Roth v. Hobson*, 5 Pa. Co. Ct. 17; *McKeever v. Albert*, 4 Pa. Co. Ct. 251.

³ *Newhouse v. Morgan*, 127 Ind. 436, 26 N. E. 158; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Vinton v. Builders' &c. Assn.*, 109 Ind. 351, 9 N. E. 177; *McLeod v. Capell*, 66 Tenn. (7 Baxt.) 196.

⁴ **Illinois**.—*McGrath v. Donaldson*, 87 Ill. App. 269.

Florida.—*Futch v. Adams* (Fla.) 36 So. 575.

New Jersey.—*Weaver v. Atlantic Roofing Co.*, 57 N. J. Eq. 547, 40 Atl. 858; *English v. Warren* (N. J. Eq.) 54 Atl. 860.

Tennessee.—*Shelby v. Hicks*, 37 Tenn. (5 Sneed) 197.

⁵ *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Clark v. Ed-*

tion in which the sub-contractor informs the owner that he is furnishing material, will not be sufficient.⁶ The notice must be given to the owner or his authorized agent.⁷ Notifying the husband of the owner will not be sufficient.⁸ If materials are furnished and notice thereafter given, it is insufficient.⁹ Notice however, may be held good as to the part that was furnished afterwards, even though some were furnished be-

wards, 119 N. Car. 115, 25 S. E. 704; *La Pasta v. Well*, 20 Misc. Rep. (N. Y.) 554, 46 N. Y. Supp. 275. But under the Iowa statute, actual knowledge or notice that the materials are furnished, is sufficient to make the owner responsible, if he pays before the expiration of the time in which notice might be given. *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863; *Queal v. Stradley*, 117 Iowa 748, 90 N. W. 588; *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105 Iowa 264, 74 N. W. 905.

⁶ *Caylor v. Thorn*, 125 Ind. 201, 25 N. E. 217; *Newhouse v. Morgan*, 127 Ind. 436, 26 N. E. 158.

⁷ *Shelby v. Hicks*, 37 Tenn. (5 Sneed), 197; *Hooker v. McGlone*, 42 Conn. 95; *Standard Radiator Co. v. Fox*, 85 Ill. App. 389. Under Mechanic's Lien Law 1895, § 5, requiring that, within ten days after the contract for a building is made, the owner shall require the contractor to give a written statement of the subcontractors, and, if any contractor fails to notify the owner within five days after the notice, the owner may cancel the contract with the contractor; one who first deals with the contractor more than ten days after the contract for a building is made cannot take advantage

of the failure of the owner to demand from the contractor a statement of the subcontractors within such ten days. *Home Lumber Co. v. Deisher*, 91 Ill. App. 628.

⁸ *Shafer v. Archbold*, 116 Ind. 29, 18 N. E. 56. A subcontractor has no lien on the wife's property for materials furnished to the husband for a building thereon unless she was notified of the intent to furnish, or unless a settlement was made with the contractor and given to him or to her agent or trustee. *Nelson v. Cover*, 47 Iowa 250; *Conway v. Crook*, 66 Md. 290, 7 Atl. 402.

⁹ *Hill v. Mathewson*, 56 Conn. 323, 15 Atl. 368. Under Code Civ. Proc. 656, as amended by Laws 1881, c. 94, providing that a subcontractor, to avail himself of the mechanic's lien law must give notice to the owner before or at the time he furnishes the materials, where the only evidence on the part of the subcontractor is that most of the materials were furnished before notice was given, no foundation is laid for the introduction of the notice of lien filed with the clerk of the court. *McMillan v. Phillips*, 5 Dak. 294, 40 N. W. 349.

Massachusetts.—*Robbins v. Blewins*, 109 Mass. 219; *Morrison v. Minot*, 87 Mass. (5 Allen) 403.

fore the articles could be separated.¹⁰ Under some statutes the notice may be given after the materials are furnished if within the limited time.¹¹ Where a statute requires that notice shall give the probable value of the materials furnished, "probable value" is held to mean an approximate value.¹² If the notice requires a description of the building a description that identifies the same will be sufficient.¹³ Unless the owner be notified in the manner prescribed by law he may pay the original contractor, without incurring any liability to the subcontractor.¹⁴ This matter of notice is one that comes up prominently when considering the proceedings that are necessary to perfect the lien.¹⁵

§ 57. **Contracts—Stipulations affecting rights of subcontractor.**—As the subcontractor's right to a lien,¹ is worked out

Pennsylvania.—*Hall v. Blackburn*, 173 Pa. 310, 34 Atl. 18, 37 W. N. C. (Pa.) 453; *Strawick v. Munhall*, 139 Pa. 163, 21 Atl. 151, 27 W. N. C. (Pa.) 195; *East Side Bank v. Columbus Tanning Co.*, 15 Pa. Co. Ct. R. 357; *Moss v. Greenberg*, 3 Pa. Dist. R. 247.

¹⁰ *Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534; *Quaack v. Schmid*, 131 Ind. 185, 30 N. E. 514; *French v. Hussey*, 159 Mass. 206, 34 N. E. 362.

¹¹ *Land Mortg. Bank v. Quanah Hotel Co.*, 89 Tex. 331, 34 S. W. 730; *Roanoke Land & Improvement Co. v. Karn*, 80 Va. 589; *Johnson v. Amarillo Imp. Co.*, 88 Tex. 505, 31 S. W. 503; *Snyder v. Monroe Eckstein Brewing Co.*, 188 N. Y. 576, 80 N. E. 1120.

¹² *Whiteside v. Lebcher*, 7 Mont. 473, 17 Pac. 548.

¹³ *Howard v. Allison*, 27 Co. Ct. (Pa.) 262. Where the law provides that "any description of the

lot or land in a notice of lien will be sufficient if from such description the lot or land can be identified," the following is sufficient, "Your church lot at the southeast corner of Alabama street and Merrill street, in the city of Indianapolis, Indiana, as well as upon the new church building recently erected there by you." *Quack v. Schmid*, 131 Ind. 185, 30 N. E. 514.

¹⁴ *Southern California Lumber Co. v. Jones*, 133 Cal. 242, 65 Pac. 378; *Jones v. Carey-Lombard Lumber Co.*, 87 Ill. App. 533; *McGrath v. Donaldson*, 87 Ill. App. 269; *Iowa Stone Co. v. Crissman*, 112 Iowa 122, 83 N. W. 794; *Truax v. Dixon*, 17 Ont. R. 366.

¹⁵ See § 74.

¹ *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512; *Bender v. Stettinius*, 10 Ohio Dec. 186, 19 W. L. B. 163; *Forster Lumber Co. v. Atkinson*, 94 Wis. 578, 60 N. W. 347.

through the general contract, such subcontractor and those working under him are bound to know the terms of that contract.² In the absence of fraud they are conclusively presumed to know the terms of the original contract. But the subcontractor will not be held to know of changes made after the original contract was entered into, unless notice of such change has been brought to his knowledge.³ The fraud of the contractor, however, will not affect rights as between the subcontractor and the owner;⁴ the owner being liable only in the manner agreed upon.^{4a} Some statutes authorize stipulations in the principal contract exempting the owner's property from

Unconstitutional to change.— "In other words, we hold that, the owner may make such a contract as he sees fit, so long as it is legal, and may make any provisions as to the time and manner of payment he chooses, and such contract he has the absolute right to comply with, in all respects, regardless of his knowledge of subcontractors, and that they have furnished labor or material which has gone into said building, and has not been paid for, unless he has, by the terms of his contract, reserved the right to discharge the claims of subcontractors from the fund which would otherwise be due to the principal contractor. If this be not so then the right to contract, without let or hindrance, so long as the thing contracted to be done is legal, is a barren right—is a right to be exercised only subject to the will of the legislature, which may ingraft upon the contract of parties, obligations to third parties (subcontractors),

which said contracting parties never dreamed of. In our judgment the legislature has no such power of interference with the right of private contract; and it cannot thus create obligations against one party, and in favor of another, in plain violation of the contract." *Epeneter v. Montgomery County*, 98 Iowa 172.

² The allowance of a lien to a subcontractor is a special privilege, and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it. *Foster v. Swaback*, 58 Ill. App. 581.

³ *Henley v. Wadsworth*, 38 Cal. 356; *McBurney v. Bradbury*, 6 La. Ann. 39; *Shaver v. Murdoch*, 36 Cal. 293.

⁴ *Diemer v. Philadelphia German Protestant Home*, 19 Pa. Sup. Ct. 225.

^{4a} *Marski v. Simmerling*, 46 Ill. App. 531; *Campbell v. Scaife*, 8 Leg. Int. (Pa.) 74.

a lien, and such stipulations are usually upheld where they do not work a fraud, though not authorized by statute.⁵ But these stipulations must be specific and plain to relieve the owner from liability.⁶ The Pennsylvania system particularly gives the owner protection by including the stipulations in the contract, but it is held that the contract need not be in writing

⁵ **California.**—*Henley v. Wadsworth*, 38 Cal. 356; *Shaver v. Murdock*, 36 Cal. 298; *Bowen v. Aubrey*, 22 Cal. 566.

Indiana.—*Swift Co. v. Dolle*, 39 Ind. App. 653, 80 N. E. 678.

New Jersey.—*Bates Mach. Co. v. Trenton & C. R. Co.*, 70 N. J. L. 684, 58 Atl. 935.

Pennsylvania.—*Fidelity Mut. Life Assn. v. Jackson*, 163 Pa. 208, 29 Atl. 883, 34 W. N. C. 464, 43 Am. St. 789; *Bolton v. Hey*, 148 Pa. 156, 23 Atl. 973, 30 W. N. C. 29; *Benedict v. Hood*, 134 Pa. 289, 19 Atl. 635; *Shroeder v. Galland*, 134 Pa. 277, 19 Atl. 632, 26 W. N. C. 33; *Cote v. Schoen*, 38 W. N. C. 382; *Sener v. Bare*, 12 Montg. Co. Law Repr. 115; *Spruks v. Mursch*, 1 Lack. Leg. N. 247; *Glassport Lumber Co. v. Wolf*, 213 Pa. 407, 62 Atl. 1074.

Tennessee.—*McCrary v. Bristol Bank & Trust Co.*, 97 Tenn. 469, 37 S. W. 543.

Wisconsin.—*Seeman v. Blemann*, 108 Wis. 365, 84 N. W. 490. The contractor's stipulation with the owner, that no liens shall be filed, is binding on subcontractors and material men; and whenever, by the terms of his contract with the owner, the contractor himself has no right to file a lien, he cannot so deal with his subcontractors and material

men as to give them the right to do so. It is the duty of one who deals with an alleged contractor to know the relation he bears to the owner; falling in this he furnishes labor and material at his peril. That duty can be properly discharged only by inquiring of the owner what the terms of the agreement between him and the contractor are. A failure to inquire, presumes notice of every fact that such inquiry would have elicited. *McElroy v. Braden*, 152 Pa. 78. See Dec. & Am. Dig. tit. Mechanics' Liens, § 101.

⁶ *Whittier v. Wilbur*, 48 Cal. 175; *Jarvis v. State Bank*, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 120. Where a building contract provided that the contractors should not permit any liens to be set up by any subcontractor, or, if any should be set up, would cause them to be satisfied, and did not contain any provision against the filing of a lien by the contractors themselves, it did not bar subcontractors from their statutory rights to liens, but only provided for their satisfaction by the contractors if set up. *Aste v. Willson*, 14 Colo. App. 323, 59 Pac. 846. Right of subcontractors to lien is not taken away by a pro-

to make the stipulations binding.⁷ However, the contract between the owner and contractor must be free from fraud as against the subcontractor.⁸ If a new contract is made, before

vision in the contract of the principal contractor obligating him to "execute and deliver a full and complete release of all liens whatsoever" to any single lot on being paid the proportionate part of his contract price, and binding him not to file any lien himself, and that he "will not suffer any lien on the said 65 buildings that can in any manner impair the lien of the 65 mortgages executed in favor of the G. Co." *Gordon v. Norton*, 186 Pa. 168, 40 Atl. 312, 42 W. N. C. 201.

See also—

Pennsylvania.—*Howarth v. Chester City Presbyterian Church*, 162 Pa. 17, 29 Atl. 291, 34 W. N. C. 470; *Samuel J. Creswell Iron Works v. O'Brien*, 156 Pa. 172, 27 Atl. 131; *Evans v. Grogan*, 153 Pa. 121, 25 Atl. 804; *Cook v. Murphy*, 150 Pa. 41, 24 Atl. 630; *Taylor v. Murphy*, 148 Pa. 337, 23 Atl. 1134, 33 Am. St. 825; *Smith v. Levick*, 153 Pa. 522, 26 Atl. 97, 32 W. N. C. 79; *Loyd & Co. v. Krause*, 147 Pa. 402, 23 Atl. 602, 29 W. N. C. 429; *Tebay v. Kirkpatrick & Co.*, 146 Pa. 120, 23 Atl. 318, 29 W. N. C. 184; *Dersheimer v. Maloney*, 143 Pa. 532, 22 Atl. 813. A stipulation by the contractor to deliver the building to the owner, a married woman, "free and discharged of all claims and liens of mechanics and material men, and all charges whatsoever," will not defeat the right of a material man to a lien there-

on. *Murphy v. Morton*, 139 Pa. 345, 20 Atl. 1049; *Murphy v. Ellis*, 11 Pa. Co. Ct. 301.

See also *Rice v. Baxter*, 15 Pa. Co. Ct. 198; *Commonwealth Title Ins. & Co. v. Ellis*, 8 Pa. Dist. 5, 22 Pa. Co. Ct. 86; *Rhine v. Mauk*, 14 Montg. Co. Law Repr. 197, 21 Pa. Co. Ct. 345; *Bithell v. Diven*, 18 Pa. Super. Ct. 178; *Hazelton Plumbing Co. v. Powell*, 13 Pa. Super. Ct. 426; *Klime v. Crider*, 20 Pa. Co. Ct. 20, 6 Pa. Dist. 688.

Must be unambiguous.—A waiver in a building contract of the subcontractor's statutory right of lien must be unambiguous, and, if one clause necessarily implies that such liens will be filed, and provides for their release by the contractor before payment of the contract price, a subsequent clause, expressly waiving the lien of subcontractors, will be ineffectual. *Commonwealth Title Ins. & Trust Co. v. Ellis*, 5 Pa. Dist. 33; *Shannon v. Philadelphia German Protestant Home for Aged*, 16 Pa. Super. Ct. 250; *Sullivan v. Hancock*, 2 Pa. Super Ct. 525, 39 W. N. C. 245.

⁷ *East Stroudsburg Lumber Co. v. Gill*, 187 Pa. St. 24, 41 Atl. 41; *McElroy v. Braden*, 152 Pa. 78, 25 Atl. 235, 31 W. N. C. 196; *Repr.*, 197, 21 Pa. Co. Ct. 345.

Rhine v. Mauk, 14 Montg. Co. Law
⁸ *Ballman v. Heron*, 169 Pa. 510, 32 Atl. 594, 37 W. N. C. 61.

Secret agreement.—A subcontractor for a house on a lot ap-

any work or materials are furnished, this contract will control, and the subcontractor will be bound by it.⁹ However, if the law requires the stipulation to be in writing and recorded, this statutory provision must be followed.¹⁰ In some jurisdictions the subcontractor must consent to stipulations in a contract exempting the property from his lien before he will be bound thereby.¹¹ And if he does not consent the stipulations will not bind him.¹² The stipulation in a contract that the contractor shall deliver the building free of all mechanics' liens does not preclude the subcontractor and material man from asserting a lien where the statute makes no provision for such stipulation, but in a general way gives the subcontractor a lien; in such cases the owner is presumed to know the law, and that this stipulation will only apply as to liens that the contractor

parently owned by the contractor, in whose name the deed stood, and who was in possession and represented himself to be the owner, is entitled to a lien for materials furnished prior to the time he knew or should have known that another was the owner, notwithstanding a secret agreement by the apparent owner to build and not allow any liens. *McCollum v. Riale*, 163 Pa. 603, 30 Atl. 282, 35 W. N. C. 389, 43 Am. St. 816. In re *Assignment of Brumbaugh*, 43 W. N. C. (Pa. Super Ct.) 271.

⁹ **New contract.**—Where work has been begun under a building contract and proceeded to a considerable extent, and the contract contains no stipulation against liens, the owner and the contractor cannot cancel the contract, and enter into a new one containing a stipulation against liens, so as

to defeat the rights of a material man to file a lien for materials ordered on the day that the new contract was executed, and delivered two days thereafter. In such a case the material man had a right to rely upon the status existing at the time that authority was given to the contractor to proceed with the work. *Lee v. Williams*, 22 Pa. Super. Ct. 564, 571; *Lee v. Williams*, 30 Pa. Super. Ct. 349, 357.

¹⁰ *Atlantic Coast Brewing Co. v. Donnelly*, 59 N. J. L. 48, 35 Atl. 647; *Mehl v. Carey*, 21 Pa. Co. Ct. 275.

¹¹ *Morton v. Clark*, 85 Me. 357, 27 Atl. 252; *Miles v. Coutts*, 20 Mont. 42, 49 Pac. 393; *Gimbert v. Heinsath*, 11 Ohio Cir. Ct. 339, 1 Ohio Cir. Dec. 176.

¹² *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846. When a contractor stipulated that he will file

himself may have.¹³ The subcontractor is bound by the stipulations as to payments.¹⁴ Under the Pennsylvania system allowing a direct lien on the property, where the contract contains a stipulation as to payment, the fact that the owner promises to retain sufficient money to pay all subcontractors, will not make the owner liable as against the stipulation in the contract.¹⁵ The fact that the consideration is payable otherwise than in money, will not defeat the subcontractor's right.¹⁶ Though a stipulation not to file a lien will not of itself preclude a lien, yet the courts will refuse to allow the lien where the mode of payment is inconsistent with the idea of a lien.¹⁷

Under the Massachusetts law, if the owner's consent is implied, and the contract is more in the nature of a direct con-

a list of subcontractors and they may be paid on his order, does not affect a stipulation against liens. *Purvis v. Brumbaugh's Estate*, 8 Pa. Super. Ct. 292.

¹³ *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114.

¹⁴ *In re Assignment of Brumbaugh*, 43 W. N. C. (Pa. Super. Ct.) 271.

¹⁵ *Waters v. Wolf*, 2 Pa. Super. Ct. 200, 39 W. N. C. 38; *Morris v. Ross*, 184 Pa. St. 241, 38 Atl. 1084.

Not in accordance with contract.—Where a written contract, containing a sufficient stipulation against liens, has been filed in the prothonotary's office in pursuance of Act, June 26, 1895 (P. L. 369), and the uncontradicted testimony of the contractor and architect is that the contractor had no authority to commence work other than that conferred by the written contract, and it appears that materials were furnished to

the contractor after the execution of the contract, and without any dealing with the owner, no lien can be filed for the materials thus furnished. *Williamson v. Tunis*, 19 Pa. Super. Ct. 207.

¹⁶ *Schmid v. Busch*, 97 Cal. 184, 31 Pac. 893.

¹⁷ *Jones & Co., Lumber Co. v. Murphy*, 64 Iowa 165, 19 N. W. 898; *Kilbourne v. Jennings*, 38 Iowa 533; *Frost v. Falgetter*, 52 Neb. 692, 73 N. W. 12; *McElroy v. Braden*, 152 Pa. 78, 25 Atl. 235, 31 W. N. C. 196. Where it is agreed between the owner and the contractor that a claim of the former against the latter shall be regarded as a payment of the last installment due under the contract, this is binding on the subcontractor filing a claim for a lien thereafter; for, under Code 1873, § 2134, he is only given a lien to the extent of the balance remaining due to the contractor. *Ewing v. Folsom*, 67 Iowa 65, 24 N. W. 595.

tract, the laborer and material man are not bound as to stipulations where they should work, or the state of the owner's account.¹⁸ Unless the owner is in some way bound to retain payments he may make them to the principal contractor as stipulated in the contract.¹⁹ He cannot be required to pay before the contract calls for the same.²⁰ The statutory requirements as to times of payment,²¹ or the filing of contracts, must be followed.²² Where the statute allows the owner to free himself from liability to the subcontractor by stipulations in the contract, the fact that changes shall be submitted to an architect, does not give the subcontractor a right to a lien.²³ Neither will a provision that a contractor was to furnish all the material himself exclude the lien.²⁴ A stipulation in a contract that if required the contractor shall furnish security before he shall be entitled to a lien, is a stipulation for the benefit of the owner and not for the benefit of the subcontractor.²⁵ If an owner upon inquiry fails to state the terms of the contract which is not recorded or filed, or known, and he replies that he will see the subcontractor paid in full, he will be estopped from setting up a different contract, or asserting that the contractor is paid.²⁶ If under the statute there is no lien, none can be given by agreement or stipulation to that effect.²⁷

¹⁸ The right is not a subrogation of lien of principal contractor. *Perry v. Potashinski*, 169 Mass. 351, 47 N. E. 1022; *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013; *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283, 44 Am. St. 391; *Wahlstrom v. Trulson*, 165 Mass. 429, 43 N. E. 183.

¹⁹ *Epeneter v. Montgomery County*, 98 Iowa 159, 67 N. W. 93; *Merritt v. Hopkins*, 96 Iowa 652, 65 N. W. 1015.

²⁰ *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625.

²¹ *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533;

Denison v. Burrill, 119 Cal. 180, 51 Pac. 1; *Brill v. De Turk*, 130 Cal. 241, 62 Pac. 462; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844.

²² *Blaisdell v. Dean*, 9 Pa. Super. Ct. 639, 44 W. N. C. 81.

²³ *Kreilich v. Klein*, 10 Phila. (Pa.) 486; *Ford v. Springer Land Assn.*, 8 N. M. 37, 41 Pac. 541.

²⁴ *Clark v. Huey* (Ind.), 26 N. E. 52.

²⁵ *Hurd v. Johnson Park Inv. Co.*, 13 Misc. (N. Y.) 643, 34 N. Y. Supp. 915.

²⁶ *Welch v. Sherer*, 93 Ill. 64.

²⁷ *Lowenstein v. Reynolds*, 92 Tenn. 543, 22 S. W. 210.

§ 58. **Persons entitled to lien as subcontractors.**—Persons who are entitled to a lien not under contract with the owner are usually called “subcontractors” and sometimes they are classed as material men and laborers, but the term “subcontractors” generally means all persons who perform or furnish a part or all of the labor or material called for in the principal contract.¹ While this is a general meaning of “subcontractor,” he is usually understood to be a person who takes a distinct part of the work or job including either or both work and material.² Such a person has no lien unless the statute gives it to him.³ A subcontractor is not a “journeyman” or “laborer,”⁴ “mechanic,”⁵ “laborer or furnisher of material,”⁶ nor one who contracts with a “subcontractor;”⁷ but the term includes “a person who shall do work or labor.”⁸ If two jointly undertake the work and then subdivide it, each taking a separate part, separately they are subcontractors.⁹ So if one contracts and

¹ Under contract with the principal contractor.

Arkansas.—Buckley v. Taylor, 51 Ark. 302, 11 S. W. 281.

District of Columbia.—Monroe v. Hannan, 7 Mackey (D. C.) 197, 3 L. R. A. 549.

Georgia.—Sparks v. Dunbar, 102 Ga. 129, 29 S. E. 295.

Illinois.—Dawson v. Harrington, 12 Ill. 300.

Iowa.—Heaton v. Horr, 42 Iowa 187. Owner not personally liable. Lonergan v. San Antonio Loan & Trust Co. (Tex.) 104 S. W. 1061, rehearing denied 106 S. W. 876; General Supply Co. v. Hunn, 126 Ga. 615, 55 S. E. 957.

² Schenck v. Uber, 81 Pa. St. 31; Stephens v. Duffy, 41 Ind. App. 385, 83 N. E. 268.

³ Under Act August 12, 1858 (Comp. St. c. 86, § 21), giving a lien to a person who performs la-

bor or materials “by virtue of a contract or agreement with the owner or agent,” a subcontractor has no lien. Toledo Novelty Works v. Bernheimer, 8 Minn. 118; Holmes v. Sands, 27 Miss. 40; Hatch v. Faucher, 15 R. I. 459, 8 Atl. 543; Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 S. E. 1001.

See Dec. & Am. Dig. tit. Mechanics’ Liens, § 106.

⁴ Rivers v. Mulholland, 62 Miss. 766.

⁵ Kelly v. Bank, McMull. Eq. (S. Car.) 431.

⁶ Adams v. Wells, 64 N. J. Eq. 211, 53 Atl. 610.

⁷ Andrews & Co. v. Atwood, 167 Ill. 249, 47 N. E. 387.

⁸ Hatch v. Faucher, 15 R. I. 459, 8 Atl. 543.

⁹ Stroebel v. Ochse, 14 Misc. (N. Y.) 522, 35 N. Y. Supp. 1089.

takes in a partner, they are principal contractors, and persons dealing with them are subcontractors. Unless the statute specifically so declares a subcontractor of a subcontractor is not entitled to a lien,¹⁰ the courts not favoring such a construction.¹¹ A statute providing that "all persons furnishing things or doing work shall be considered subcontractors;" a person so furnishing under contract with the subcontractor, is included.¹² Many of the statutes give the right to a lien to an employe of a principal contractor,¹³ but do not extend such right to an employe of a subcontractor,¹⁴ unless the owner

¹⁰ **Alabama.**—Turcott v. Hall, 8 Ala. 522.

Colorado.—Sayre-Newton Lumber Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. 844.

District of Columbia.—Somerville v. Williams, 12 App. Cas. (D. C.) 520; Herrell v. Donovan, 7 App. Cas. (D. C.) 322; Monroe v. Hannan, 7 Mackey (D. C.) 197, 3 L. R. A. 549.

Illinois.—Smith Bridge Co. v. Louisville &c., R. Co., 72 Ill. 506; Rothgerber v. Dupuy, 64 Ill. 452.

Kansas.—Nixon v. Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236.

New York.—Wood v. Donaldson, 17 Wend. (N. Y.) 549.

Ohio.—Stephens v. United Railroads Stock Yards Co., 29 Ohio St. 227, 5 Ohio Dec. 334, 1 Wkly. L. Bull. (Ohio), 84, 4 Am. L. Rec. 669.

Oklahoma.—Vanderberg v. Walton Lumber Co. (Okla.), 92 Pac. 149.

South Carolina.—Geddes v. Bowden, 19 S. Car. 1.

Wisconsin.—Harbeck v. Southwell, 18 Wis. 419 (439).

¹¹ **Connecticut.**—Barlow Bros.

Co. v. Gaffney, 76 Conn. 107, 55 Atl. 582.

Illinois.—Culver v. Atwood, 170 Ill. 432, 48 N. E. 979.

New Jersey.—Carlisle v. Knapp, 51 N. J. L. 329, 17 Atl. 633.

Rhode Island.—Morrison v. Whaley, 16 R. I. 715, 19 Atl. 330.

West Virginia.—McGugin v. Ohio River R. Co., 33 W. Va. 63, 10 S. E. 36.

Wisconsin.—Farmer v. St. Croix Power Co., 117 Wis. 76, 93 N. W. 830; Dallman v. Clasen, 116 Wis. 113, 92 N. W. 565.

¹² Duignan v. Montana Club, 16 Mont. 189, 40 Pac. 294.

¹³ **Massachusetts.**—Clark v. Kingsley, 90 Mass (8 Allen) 543; Weeks v. Walcott, 81 Mass. (15 Gray) 54; Dewing v. Congregational Soc. &c., 79 Mass. (13 Gray) 414.

New York.—Heroy v. Hendricks, 4 E. D. Smith (N. Y.) 768.

Wisconsin.—Harbeck v. Southwell, 18 Wis. 419 (439).

¹⁴ **Alabama.**—Turcott v. Hall, 8 Ala. 522.

Georgia.—Heard v. Holmes, 113 Ga. 159, 38 S. E. 393.

consents thereto,¹⁵ or the statute specifically so provides.¹⁶ Before it will be held that the statute gives such a lien it must be so plain as not to admit of a doubt.¹⁷ In some instances, however, the lien has been allowed for materials that were purchased on the personal credit of the purchaser,¹⁸ but this

Illinois.—*Ahern v. Evans*, 66 Ill. 125; *Rothgerber v. Dupuy*, 64 Ill. 452; *Berkowsky v. Sable*, 43 Ill. App. 410.

New York.—*Heroy v. Hendricks*, 4 E. D. Smith (N. Y.) 768.

Pennsylvania.—*Kitson v. Crump*, 9 Phila. (Pa.) 41.

Texas.—*Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500.

Vermont.—*Greenough v. Nichols*, 30 Vt. 768.

¹⁵ *New v. Carroll*, 73 Hun (N. Y.) 564, 26 N. Y. Supp. 320. An "employee" is not a journeyman. *Jobsen v. Boden*, 8 Pa. St. 463.

¹⁶ **Illinois.**—*Shaar v. Knickerbocker Ice Co.*, 149 Ill. 441, 37 N. E. 54; *Newhall v. Kastens*, 70 Ill. 156; *Rothgerber v. Dupuy*, 64 Ill. 452.

Indiana.—*Barker v. Buell*, 35 Ind. 297; *Stephens v. Duffy*, 81 N. E. 1154, rehearing denied, 41 Ind. App. 385, 83 N. E. 268.

New Jersey.—*Fehling v. Goings*, 67 N. J. Eq. 375, 58 Atl. 642; *Carlisle v. Knapp*, 51 N. J. L. 329, 17 Atl. 633.

Ohio.—*Stephens v. United Railroads Stockyard Co.*, 29 Ohio St. 227, 5 Ohio Dec. 334, 1 Wkly. L. Bull. (Ohio) 84, 4 Am. L. Rec. 669.

Pennsylvania.—*Harlan v. Rand*, 27 Pa. St. 511.

Tennessee.—*Bedford Stone Co. v. Board of Publication of Cum-*

berland Presbyterian Church, 91 Tenn. 200, 18 S. W. 406.

Texas.—*Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558.

Wisconsin.—*Kirby v. McGarry*, 16 Wis. 68.

¹⁷ **Missouri.**—*Front Rank Steel Range Co. v. Jeffers*, 79 Mo. App. 174, 2 Mo. App. Repr. 361.

Nebraska.—*Zarrs v. Keck*, 40 Neb. 456, 58 N. W. 933; *Pomeroy v. White Lake Lumber Co.*, 33 Neb. 243, 49 N. W. 1131.

New York.—*Mack v. Colleran*, 136 N. Y. 617, 32 N. E. 604.

Tennessee.—*Lowenstein v. Reynolds*, 92 Tenn. 543, 22 S. W. 210; *Bedford Stone Co. v. Board Publication*, 91 Tenn. 200, 18 S. W. 406.

Texas.—*Bassett v. Mills*, 89 Tex. 162, 34 S. W. 93.

¹⁸ **On personal credit.**—Under Laws, 1885, c. 342 1, providing that any person who shall furnish any materials used in erecting a building, with the consent of the owner or agent, or any contractor or subcontractor, or any other person contracting with such owner, may have a lien, one who furnishes to a subcontractor, though on his personal credit, material used in the construction of the building, is entitled to a lien. *Vogel v. Luitweller*, 52 Hun (N. Y.) 184, 5 N. Y. Supp. 154.

construction is not generally followed.¹⁹ Material men furnishing material to a principal contractor are generally entitled to a lien,²⁰ such right resting upon the statute.²¹ Sometimes, however, it is said to rest upon the fact that the materials were furnished.²² Where the statute provides that it shall include "a person doing or performing work," it will not include a person furnishing lumber.²³ The earlier laws did not give the right to a lien to persons who furnish material to contractors.²⁴ Persons furnishing material to a material man are considered as a subcontractor of a subcontractor and will not be entitled to the lien unless the statutes specifically so provide.²⁵ Of course an owner will not be held if there was

¹⁹ *Western Sash & Door Co. v. Buckner*, 80 Mo. App. 95, 2 Mo. App. Repr. 549; *Browinski v. Pickett*, 113 Ky. 420, 68 S. W. 408, 24 Ky. L. 305.

²⁰ *Neeley v. Searlight*, 113 Ind. 316, 15 N. E. 598; *Colter v. Frese*, 45 Ind. 96; *Dunham v. Milhous*, 70 Ala. 595; *Campbell v. William Cameron & Co.*, 5 Ind. Terr. 323, 82 S. W. 762. Either as a material man or subcontractor. *Rynlak v. Seawell*, 13 Okla. 737, 76 Pac. 170; *Owen v. Johnson*, 174 Pa. St. 99, 34 Atl. 549, 38 W. N. C. 185; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729.

²¹ *Sodini v. Winter*, 32 Md. 130.

²² *Gould v. Barnard*, 14 Mont. 335, 36 Pac. 317.

²³ *Burst v. Jackson*, 10 Barb. (N. Y.) 219.

²⁴ *Minnesota*.—*Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

Mississippi.—*Holmes v. Shands*, 26 Miss. (4 Cush.) 639; *Shotwell v. Kilgore*, 26 Miss. (4 Cush.) 125.

New York.—*Burst v. Jackson*, 10 Barb. (N. Y.) 219.

Pennsylvania.—*Schenck v. Uber*, 81 Pa. St. 31; *Lee v. Burke*, 66 Pa. St. 336.

Texas.—*Shields v. Morrow*, 51 Tex. 393.

²⁵ *California*.—*Roebbling's Sons' Co. v. Humboldt Elec. Light, etc., Co.*, 112 Cal. 288, 44 Pac. 568.

Iowa.—*Heaton v. Horr*, 42 Iowa 187.

Kentucky.—*Hightower v. Bailey*, 108 Ky. 198, 56 S. W. 147, 49 L. R. A. 255.

Louisiana.—*Woodard v. American Exposition R. Co.*, 39 La. Ann. 566, 2 So. 413.

Minnesota.—*Pittsburg Plate Glass Co. v. Sisters of the Sorrowful Mother*, 83 Minn. 29, 85 N. W. 829; *Forman v. St. Germain*, 81 Minn. 26, 83 N. W. 438; *Merriman v. Jones*, 43 Minn. 29, 44 N. W. 526.

Missouri.—*Hause v. Thompson*, 36 Mo. 450.

Oregon.—*Fisher v. Tomlinson*, 40 Ore. 111, 60 Pac. 390, 66 Pac. 696.

no contract made to authorize the work.²⁶ The materials furnished must not be inconsistent with the lien.²⁷ If similar material went into the building it will be presumed that it was purchased for that purpose.²⁸ Sometimes where the parties may not strictly come within the statute, yet if a court of equity acquires jurisdiction of the fund it will distribute it equitably to all who are entitled thereto.²⁹

§ 59. Subcontractor's lien on fund—Ohio statute.—Section 3193 of the Revised statutes of Ohio provides that any subcontractor, material man, laborer or mechanic, who has performed labor or furnished material, fuel or machinery, who is performing labor, or furnishing material, fuel, or machinery, or who is about to perform labor, or furnish material, fuel or machin-

Pennsylvania.—*Duff v. Hoffman*, 63 Pa. St. 191; *Steinmetz v. Boudinot*, 3 Serg. & R. (Pa.) 541. 1 Hill's Ann. Codes & St. Wash. 1663, giving a lien to one who furnishes materials "at the instance of the owner" of the building or his agent, and making a contractor having charge of the construction or repair of the building the owner's agent for this purpose does not contemplate a lien in favor of one who sells materials to one who is under contract to furnish such materials to the owner. *Pacific Rolling-Mills Co. v. James Street Const. Co.*, 68 Fed. 966, 16 C. C. A. 68, 29 U. S. App. 698.

²⁶ *Stout v. McLachlin*, 38 Kan. 120, 15 Pac. 902.

²⁷ Where there are two corporations doing substantially one thing and carrying out substantially one set of contracts, one of them attending to the financial part and the other to the

manufacturing, and one being virtually at all times under the control of the other, there is no principle by which one can assert a mechanic's lien against the other. *Andrews, etc., Iron Co. v. Isaac D. Smead Heating, etc., Co.*, 7 Ohio (N. P.) 439, 5 Ohio (S. & C. P.) Dec. 292.

²⁸ *Frudden Lumber Co. v. Kinnan*, 117 Iowa 93, 90 N. W. 515.

²⁹ The mechanic or workman performing labor, or party furnishing materials, for a subcontractor, is not entitled under the statute to any lien, for the lien given does not extend further than to the subcontractor. But, where a court of equity acquires jurisdiction of the fund due a subcontractor on a bill of interpleader, in which the persons performing labor or furnishing materials for the subcontractor are made parties, it is the duty of the court to adjust the equities of all parties interested in the fund, as

ery for the construction, alteration, removal, or repair of any property, appurtenance or structure, as described in sections three thousand one hundred and eighty-four¹ and three thousand one hundred and eighty-six,² or for the construction, improvement or repair of any turnpike, road improvement, sewer, street or other public improvement, or public building provided for in a contract between the owner, or any board, officer or public authority and a principal contractor, and under a contract between such subcontractor, material man, laborer or mechanic and a principal contractor or subcontractor, may at the time of beginning to perform such labor or furnish such material, fuel or machinery, or at any time thereafter, not to exceed four months from the performance of such labor or the delivery of such machinery, fuel or material, file with the owner, board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed, and to be performed, material, fuel or machinery furnished, containing a description of any promissory note or notes that may have been given by the principal contractor or subcontractor on account of said labor, machinery or material, or any part thereof, with all credits and set-offs therein.³ Under this section, the subcontractor's lien may easily be said to be a method of fixing a personal liability on the owner, for work performed on a structure belonging to him. When its provisions are complied with, the subcontractor, or material man, furnishing material, become subrogated to the rights of the principal contractor as to whatever may be due or owing from the owner to him, under their contract. It follows in its general principles what is known as the New York System.

§ 60. Subcontractor's lien—Ohio statute—Who may acquire—Character of structure.—The statute would seem to include all persons performing labor for another person having a con-

they have an equitable claim on the fund. *Newhall v. Kasten*, 70 Ill. 156.

¹ See § 44.

² See § 44.

³ 99 Ohio Laws 500.

tract with the owner. The statute specifically says that subcontractors, material men, laborers and mechanics, shall be entitled to take out the lien. A subcontractor of a subcontractor may so far as his own individual claim is concerned, be included, but a mechanic or material man furnishing labor to a subcontractor of a subcontractor is not included. The statute specifically states that the kind of structure for which a lien may be claimed on the fund, is that stated in Sections 3184 and 3186.⁴ And in addition it makes provision for withholding of funds where the structure is of a public character. In that respect it goes beyond the rights of a principal contractor.

§ 61. Subcontractor's lien—Ohio Statute—Character of work—Contract.—The kind of work for which subcontractors and material men are given a lien is of the same character as that named in the section relating to principal contractors, and what is heretofore said as to that section will apply here.⁵ It is not thought that a material man seeking to enforce his lien as a subcontractor against a fund due the principal contractor will be required to show that his material actually went into the building. There might be a case between two material men where its actual use in the building would need to be shown. In all cases, where a subcontractor, material man or laborer working under such subcontractor or principal contractor is allowed to enforce a right upon a fund that may be payable for the improvement, there must exist two contracts. There must be a contract between the owner of the property and the principal contractor. This is necessary before the lien on the fund is had. Then there must also be a contract between the principal contractor and the subcontractor. If either one of these does not exist, the benefits of the statute can not be claimed. This contract may be express or implied.⁶

⁴ See § 44.

⁵ See § 44.

⁶ *Dunn v. Rankin*, 27 Ohio St. 132.

§ 62. Subcontractor's lien—Ohio statute—Procedure.—In order to secure a claim the mechanic must file a sworn, itemized statement with the owner within four months from the performance of such labor or delivery of such machinery. As to the time when this period begins, the same rules apply as in the taking out of a lien by a principal contractor. There is, however, this marked difference; the principal contractor can only perfect his lien after the work has been done or the materials furnished. The subcontractor may secure himself by filing the claim, at the beginning of the performance of his labor, or when the first item of the material is furnished. And it will be in time if filed within four months from the time that the last work was performed or the last item of materials furnished. There must be an actual service made on the owner. The fact that the owner is absent or has absconded or is inaccessible will not excuse a failure to serve.⁷ The statement must be filed with the person designated by the statute, that is, the owner, board or officer or authorized clerk, or agent. By officer or authorized agent, or clerk, is meant the officer, agent or clerk of the owner, board, or corporation having the work done or materials furnished, who has control of the improvement, and through whom payments are made for the work or materials thereon, or upon such person upon whom the duty devolves to see that the proper persons are paid, for their work or material furnished, for the proposed improvement. Until the statement is actually delivered to and received by the designated person, it cannot be said to be filed with him. It is immaterial who delivers the statement. The claimant does not have to do it personally, but it is important to preserve evidence of the time of delivery of this statement. If not filed within the required time the subcontractor can

⁷ *McCune v. Snyder*, 9 Ohio Cir. Dec. 572, 18 Ohio C. C. 24. The

lien dates from the time of delivery to owner. *Copeland v. Manton*, 22 Ohio St. 398.

claim no priority.⁸ The language in the section, relating to subcontractors, is very similar to that contained in the section relating to principal contractors, and much that was said thereunder, is applicable here.⁹ The account should be itemized so as to show the labor or material, the price of which is sought to be made subject to the lien. The statute should be substantially followed, and the statement would not be held to be invalid, if the facts were stated, though in a crude way.¹⁰

§ 63. Subcontractor's lien—Ohio statute—form of lien statement.—A lien statement after the following form will satisfy the requirements of the statute:

Springfield, Ohio, ..., 19.. .

C. D.—Dear Sir: You are hereby notified that in pursuance of a written contract entered into between A B and myself, on the day of, 19..., a copy of which is as follows, towit: (Here copy contract; or if not in writing, then so state, and give substance, stating amount and value and items furnished, or to be furnished, with amounts and times of payments.) I have furnished (or am about to furnish) the materials and labor therein provided for, an itemized statement of the amount and value of which is hereto attached, marked exhibit "A" and made a part hereof, in and towards the construction of the building described, and contracted for between yourself and the said A B as principal contractors, as per your written contract with him of the day of 19..., a copy of which you have, to which reference is here made, (or if not in writing, then so state, and give substance) on the premises owned by you, situate in the County of, State of Ohio, and described as follows: (Here describe premises on which building is to be erected, or abutting property, if for street improvement.)

⁸ Tollheis v. James, 7 Ohio C. C. 386, 4 Ohio Cir. Dec. 646.

⁹ See § 44.

¹⁰ Bender v. Stettinius, 19 Ohio L. Bull. 163, 10 Ohio Dec. (Re.) 186.

The following promissory notes have been given by said A. B., principal contractor (or sub-contractor according to the fact) as aforesaid on account of said labor, machinery, or material, or any part thereof with all credits and set-offs thereon, to wit: (Here describe same.)

Said E. F. claims a lien on all payments, due or to become due A. B. from yourself under said contract, in accordance with Section 3193, R. S.

(Signed) E. F.

The State of Ohio, Clark County, ss.

E. F. (agent or attorney) being duly sworn according to law, deposes and says, that the statement of the foregoing notice and the exhibit therein referred to and made a part thereof, are true in substance and in fact. E. F.

Sworn to and subscribed before me, and in my presence, this day of A. D. 19

Exhibit "A:":

A. B. In account with Dr.
To item.

§ 64. Performance of principal contract as affecting those not under direct contract with the owner.—Much that was said in a previous section,¹ is applicable here, and while a subcontractor is bound by the terms of the original contract he is not affected by changes made therein afterwards, unless he has assented thereto.² And the fact that the owner permitted the contractor to get some material on the owner's credit, is

¹ See §§ 49-52.

² **California**.—Shaver v. Murdock, 36 Cal. 293.

Georgia.—Cambridge Tile Mfg. Co. v. Germania Bank, 128 Ga. 178, 57 S. E. 311; General Supply

Co. v. Hunn, 126 Ga. 615, 55 S. E. 957.

Illinois. — Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

Kansas.—Nixon v. Cydon Lodge

not sufficient from which authority may be implied for the purchase of other materials.³ But if the owner assents to a subcontractor's contract, even though such contract is not within the terms of the original contract, the owner is estopped from denying the right of the subcontractor.⁴ If the statute requires the owner to do something to escape liability and he fails, he will likewise be estopped from denying the subcontractor's right.⁵ As was noticed in a previous section⁶ the doctrine of the entirety of contracts resulted in so much hardship that in the case of mechanics' liens it has been relaxed, and while a few decisions maintain that the contract is entire, and that if the contractor abandons the contract before its performance the subcontractor has no lien,⁷ the general doctrine is that such action on the part of the contractor will not defeat the subcontractor's right,⁸ and that the subcontractor will be entitled to a lien for the reasonable value of the materials and work, after deducting any claims or damages for non-performance of contract by the principal con-

No. 5, 56 Kan. 298, 43 Pac. 236.

Louisiana.—*Girarthy v. Campbell*, 6 Rob. (La.) 378.

Maryland.—*Greenway v. Turner*, 4 Md. 296.

New York.—*Jenks v. Brown*, 66 N. Y. 629.

Pennsylvania.—*Smith v. Levick*, 153 Pa. St. 522, 26 Atl. 97, 32 W. N. C. (Pa.) 79.

See Dec. & Am. Dig. tit. Mechanics' Lien § 110.

³ *Sunset Brick & Tile Co. v. Stratton* (Tex. Civ. App.), 53 S. W. 703.

⁴ *Wambold v. Gehring*, 109 Wis. 122, 85 N. W. 117; *Rosenbaum v. Carlisle*, 78 Miss. 882, 29 So. 517.

⁵ *Buckley v. Hann*, 68 N. J. L. 624, 54 Atl. 825.

⁶ See §§ 49, 65.

⁷ **New York.**—*Lemieux v. English*, 19 Misc. (N. Y.) 545, 43 N. Y. Supp. 1066; *Smith v. Sheltering Arms*, 89 Hun (N. Y.) 70, 35 N. Y. Supp. 62; *Cunningham v. Jones*, 3 E. D. Smith (N. Y.) 650, 4 Abb. Pr. (N. Y.) 433; *Linn v. O'Hara*, 2 E. D. Smith (N. Y.) 560, 1 Abb. Pr. (N. Y.) 360.

Wisconsin.—*Malbon v. Birney*, 11 Wis. 107 (112). When the contract specifies that the work is to be done in a certain manner, and paid for when the work is completed, and it is not done, no recovery can be had. *Brydon v. Lutes*, 9 Manitoba 463.

⁸ *Rockwood v. Walcott*, 85 Mass. (3 Allen) 458. Owner's fault. *Drake v. O'Donnell*, 49 How. Pr. (N. Y.) 25; *Wright v.*

tractor.⁹ From this amount there should also be deducted payments rightfully made to the principal contractor.¹⁰ Under this rule if an instalment is due before the contract is abandoned, it has been held that the subcontractors are entitled to a lien on such instalment.¹¹ Unless changes have been made and assented to, or are within the knowledge of the subcontractor, the work performed by the principal contractor must

Roberts, 43 Hun (N. Y.) 413; Cook v. Murphy, 150 Pa. St. 41, 24 Atl. 630, 30 W. N. C. (Pa.) 335.

⁹ McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129. Where the owner wrongfully pays the contractor in violation of Hurd's Rev. St. 1899, p. 1113, § 33, providing that no payment to the contractor shall be regarded as rightfully made, as against subcontractors, if made without enforcing the powers conferred by sections 5 and 23, providing means by which the owner can ascertain the existence and extent of subcontractors' claims, the fact that the contractor failed to perform a part of the work will not defeat the subcontractors' liens, when the contract price, after deducting the value of the work undone, exceeds the amount due the subcontractors. Keeley Brewing Co. v. Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923.

See also —

Arkansas.—Long v. Abeles, 77 Ark. 156, 93 S. W. 67.

Illinois.—Morehouse v. Mouldiny, 74 Ill. 322; Miller v. Calumet Lumber & Mfg. Co., 111 Ill. App.

56; Marski v. Simmerling, 46 Ill. App. 531.

New York.—Person v. Stoll, 174 N. Y. 548, 67 N. E. 1089; Wright v. Roberts, 43 Hun (N. Y.) 413.

Ohio.—Sturm v. Ritz, 7 Ohio Dec. (Re.) 135, 1 Wkly. L. Bull. 150.

Texas.—Fall v. Nichols, 43 Tex. Civ. App. 582, 97 S. W. 145.

¹⁰ Mantonya v. Reilly, 83 Ill. App. 275; Maneely v. New York, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976; Wright v. Schoharie Valley R. Co., 116 App. Div. (N. Y.) 542, 101 N. Y. Supp. 801; Schoharie Valley R. Co. v. Union Free School Dist. No. 1, 112 App. Div. (N. Y.) 542, 101 N. Y. Supp. 801; Long v. Abeles, 77 Ark. 156, 93 S. W. 67.

¹¹ Hunnicutt v. Van Hoose, 111 Ga. 518, 36 S. E. 669; Conklin v. Plant, 34 Ill. App. 264; St. Paul's Protestant Episcopal Church v. Giraud, 15 La. Ann. 124. Where the contract for building a house contains a provision that from time to time payments to the amount of 80 per cent. of the value of the work done may be made, and that the remaining 20 per cent. should be paid when the completed work was accepted, and the contractor abandoned

be within the terms of the original contract.¹² If the work is abandoned and the owner finishes the building, for work or labor done under him the lien will exist in full, while for that furnished before abandonment, the lien will only be upon the portion that was then performed, taking into consideration the entire contract price.¹³

§ 65. **Performance of principal contract as affecting subcontractors—stipulations in contract.**—Of course if the owner has complied with the law and his contract and there is nothing due the contractor, there is no lien; that is, if under the Pennsylvania system he had made proper stipulations in his contract, or under the New York system he had made payments in full, before notice, the subcontractor will not be entitled to a lien.¹⁴ If the statute provides that upon a principal contractor's abandonment the subcontractors may finish it, and they do not, the owner can and may deduct the cost of

the work before completion, a subcontractor can have no claim on the 20 per cent. of the value of the work done by the contractor before quitting, which had been retained by the owner, since such 20 per cent. never became due under the contract. *Hawkins v. Burrell*, 69 App. Div. (N. Y.) 462, 74 N. Y. Supp. 1003. See also—

Iowa.—*Nancolas v. Hitafter*, 136 Iowa 341, 112 N. W. 382, 12 L. R. A. (N. S.) 864n.

New Jersey.—*Beckhard v. Rudolph*, 68 N. J. Eq. 740, 63 Atl. 705.

New York.—*New Jersey Steel & Iron Co. v. Robinson*, 33 Misc. (N. Y.) 361, 68 N. Y. Supp. 577; *Sheffield v. Loeffler*, 50 Hun (N. Y.) 606, 3 N. Y. Supp. 150.

Oregon.—*Whittier v. Blakely*, 13 Ore. 546, 11 Pac. 305.

¹² *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676; *Seeman v. Bie-man*, 108 Wis. 365, 84 N. W. 490.

¹³ *Delray Lumber Co. v. Keohane*, 132 Mich. 17, 92 N. W. 489; *Brainard v. Kings County*, 155 N. Y. 538, 50 N. E. 263; *House v. Schulze*, 21 Tex. Civ. App. 243, 52 S. W. 654.

¹⁴ *Hunnicut v. Van Hoos*, 111 Ga. 518, 36 S. E. 669. Last payment forfeited for non-compliance. *Preusser v. Florence*, 51 How. Pr. (N. Y.), 385, 4 Abb. N. Cas. (N. Y.) 136; *Ritter v. Houston Oil Refining & Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758; *Breneman v. Beaumont Lumber Co.*, 12 Tex. Civ. App. 517, 34 S. W. 198.

the same from the principal contract.¹⁵ In some cases, where the statute makes the owner directly responsible, and the subcontractor has actually furnished work and material, it is held that an abandonment does not affect the subcontractor's right.¹⁶ Where one contract is made for separate buildings and subcontracts are let on the separate buildings, as to the subcontractors, each contract would be considered a separate contract, and rights will be determined accordingly.¹⁷ If the owner is not under legal obligation to retain payments either by stipulations in his contract, or failure to comply with the statutory requirements of notice,¹⁸ and pays the contractor all that is due him up to the time of the abandonment, the subcontractors have no lien,¹⁹ as the rights of subcontractors or material men are not greater than the person who employs

¹⁵ *Furnished by another.* *Burr v. Mazer*, 2 Pa. Super. Ct. 436, 39 W. N. C. Pa. 157; *Simonton v. Cicero Lumber Co.*, 108 Ill. App. 481.

¹⁶ *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821; *Red River Lumber Co. v. Children of Israel*, 7 N. Dak. 46, 73 N. W. 203.

¹⁷ *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118. Where a contractor agrees to build several buildings, with a separate price and a different day of completion for each, it is a severable contract; and if the owner under the contract, after the abandonment by the contractor, completes the work, and the cost of completing any one or more of the buildings was less than the amount the contractor would have been entitled to if he had completed it, the owner is liable to the material men who have filed liens for the difference. *White v. Livingston*, 69

App. Div. (N. Y.) 361, 75 N. Y. Supp. 466; *Timmons v. Casey*, 19 Tex. Civ. App. 476, 47 S. W. 805.

¹⁸ See §§ 56, 61.

¹⁹ *California*.—*Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Blythe v. Poultney*, 31 Cal. 233; *Henley v. Wadsworth*, 38 Cal. 356. *Illinois*.—*Schultz v. Hay*, 62 Ill. 157.

New York.—*Kelly v. Bloomingdale*, 139 N. Y. 343, 34 N. E. 919; *McChesney v. Syracuse*, 75 Hun (N. Y.) 503, 27 N. Y. Supp. 508; *Beecher v. Schuback*, 4 Misc. (N. Y.) 54, 23 N. Y. Supp. 604; *Watson v. Cone*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 224; *McDougall v. Nast*, 5 N. Y. St. 144; *Allen v. Carman*, 1 E. D. Smith (N. Y.) 692; *Weisemair v. Buffalo*, 57 Hun (N. Y.) 48, 10 N. Y. Supp. 569.

Texas.—*Dudley v. Jones*, 77 Tex. 69, 14 S. W. 335, 25 S. W. 994; *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907.

them.²⁰ If there is a stipulation in the original contract that the owner may, upon the contractor's default, proceed and finish the work, and the owner so proceeds, and it requires all the balance of the contract price to finish the same, the subcontractor has no lien right.²¹ However, any balance left is subject to the subcontractor's lien rights.²² This is true even though there was nothing due the contractor at the time of the abandonment.²³ It has been held under some statutes that if there was an instalment due and unpaid at the time of the abandonment, the subcontractor would have a lien on that instalment, even though nothing might be due after the completion of the job.²⁴ But if there is no stipulation that the owner may finish, and the contractor has been paid all that was due him at the time of the abandonment, and the owner finishes, there will be no lien to a subcontractor, even if finished at a less cost than the contract price.²⁵ Before a subcontractor is entitled to assert his lien right, unless in some way prevented by the fault of the owner, he must show that he has substantially performed the part of the work allotted to him by the contractor in accordance with the principal contract.²⁶

²⁰ *Jewell v. Paron*, 94 Mich. 83, 53 N. W. 951.

²¹ *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118; *Ferguson v. Burk*, 4 E. D. Smith (N. Y.) 760; *Blakeslee v. Fisher*, 66 Hun (N. Y. 261, 21 N. Y. Supp. 217.

²² *Ogden v. Alexander*, 140 N. Y. 356, 35 N. E. 638; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Schmohl v. O'Brien*, 25 Misc. (N. Y.) 699, 55 N. Y. Supp. 629.

²³ *Campbell v. Coon*, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410n; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017.

²⁴ *Foshay v. Robinson*, 137 N. Y. 134, 32 N. E. 1041.

²⁵ *Ogden v. Alexander*, 140 N. Y. 356, 35 N. E. 638; *Hollister v. Mott*, 132 N. Y. 18, 29 N. E. 1103; *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447, *Wheeler v. Scofield*, 67 N. Y. 311.

²⁶ *Mantonya v. Reilly*, 184 Ill. 183, 56 N. E. 425; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. 418. The fact that the main contractor's construction of a contract with a subcontractor was erroneous in one detail did not justify the subcontractor in failing to perform other work concededly within the contract. *MacKnight Flintic Stone Co. v. New York*, 176 N. Y. 586, 68 N. E. 1119. See also

Slight deviations,²⁷ or defects in the architecture,²⁸ or the fact that the contract between the contractor and subcontractor has not been followed in full, will not prevent the subcontractor's lien for the materials furnished or labor performed.²⁹ It will be observed from statements heretofore made that the fact that the contractor has abandoned the work and the owner finishes it, will not necessarily defeat the subcontractor's right.³⁰ If a third party assumes to do the work by consent of all parties concerned he will have the rights of the persons whose place he has taken.³¹

§ 66. **Matters affecting rights of those not under direct contract with the owner.**—There being no privity of contract between the subcontractor and the principal owner and the right to the lien depending solely upon statute, it follows that a subcontractor cannot claim a lien unless he shows a compliance with the statute.¹ Of course if the subcontractor has been

Mull v. Jones, 18 N. Y. Supp. 359, 45 N. Y. St. 643; Mahon v. Guilfoyle, 18 N. Y. Supp. 93, 44 N. Y. St. 879; Rand v. Leeds, 2 Phila. (Pa.) 160. See Dec. & Am. Dig. tit. Mechanics' Liens, § 12.

²⁷ Toan v. Russell, 111 Ill. App. 629; Welch v. Sherer, 93 Ill. 64.

²⁸ Mantonya v. Reilly, 184 Ill. 183, 56 N. E. 425; Welch v. Sherer, 93 Ill. 64.

²⁹ Newcomer v. Hutchings, 96 Ind. 119.

³⁰ Bates v. Trustees of Masonic Hall & Asylum Fund, 7 Misc. (N. Y.) 609, 27 N. Y. Supp. 951.

³¹ Moore v. Erickson, 158 Mass. 71, 32 N. E. 1031; Brainard v. Kings County, 84 Hun (N. Y.) 290, 32 N. Y. Supp. 311; Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74; Murphy v. Watertown, 99 N. Y. Supp. 6, 112 App. Div. (N. Y.) 670.

¹ Stevens v. Ogden, 130 N. Y. 182, 29 N. E. 229; McCorkle v. Hermann, 117 N. Y. 297, 22 N. E. 948; Mahoney v. McWalters, 3 App. Div. (N. Y.) 248, 38 N. Y. Supp. 256; Hall v. Baldwin, 45 N. J. Eq. 858, 18 Atl. 976. A person to be entitled to the remedy given by section 3 of the mechanic's lien law must (1) be a creditor of the contractor, whose debt was contracted for work done on the building erected by the contractor for the owner, or for material furnished for the building; (2) his debt must be due; (3) there must be a demand, as the creditor is entitled to be paid at once; and (4) he must give notice in writing to the owner of the contractor's refusal to pay, and of the amount by him demanded. Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269; Stephens v.

paid in full his rights are extinguished.² And even if not paid in full, he can not acquire a lien on a claim for unliquidated damages.³ He may lose his claim by waiver. Where his right to the fund is fixed by giving notice, so much of the amount due or becoming due to the contractor as will equal the claim of the subcontractor, becomes transferred to him.⁴ And he would have an equitable claim on the fund even though he might not enforce it on the building.⁵ The fact that the contractor ceases work, by fault of the owner,⁶ or the property goes into the hands of a receiver, will not affect the right of the subcontractor to the amount justly due on the principal contract.⁷ If a payment is to be made the contractor in land,

United Railroads Stock Yard Co., 29 Ohio St. 227.

² **Wood v. Donaldson**, 17 Wend. (N. Y.) 550; **Wood v. Atlantic &c. R. Co.**, 131 N. Car. 48, 42 S. E. 462; **Muller v. McLaughlin**, 37 Tex. Civ. App. 449, 84 S. W. 687.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 133.

³ **Miner v. Hoyt**, 4 Hill (N. Y.) 193; **Mayer v. Mutchler**, 50 N. J. L. 162, 13 Atl. 620.

⁴ **California**.—**Newport Wharf & Lumber Co. v. Drew**, 125 Cal. 585, 58 Pac. 187; **Russ Lumber & Mill Co. v. Roggenkamp** (Cal.), 35 Pac. 643; **Bates v. Santa Barbara County**, 90 Cal. 543, 27 Pac. 438.

Illinois.—**Griffin v. Booth**, 152 Ill. 219, 38 N. E. 551; **Culver v. Fleming**, 61 Ill. 498.

Louisiana.—**Jorda v. Gobet**, 5 La. Ann. 431; **Allen v. Willis**, 4 La. Ann. 97.

New Jersey.—**Kreutz v. Cramer**, 64 N. J. Eq. 648, 54 Atl. 535; **Budd v. School Dist. No. 4**, 51 N. J. L. 36, 16 Atl. 194; **Anderson v. Huff**, 49 N. J. Eq. 349, 23 Atl. 654.

New York.—**Develin v. Mack**, 2 Daly (N. Y.) 94.

Ohio.—**Dunn v. Rankin**, 27 Ohio St. 132; **McCullom v. Richardson**, 2 Handy (Ohio) 274.

West Virginia.—**Stout v. Golden**, 9 W. Va. 231.

⁵ **California**.—**Bates v. Santa Barbara County**, 90 Cal. 543, 27 Pac. 438; **Weldon v. Superior Court of Los Angeles County**, 138 Cal. 427, 71 Pac. 502.

Iowa.—**Breneman v. Harvey**, 70 Iowa 479, 30 N. W. 846.

Kentucky.—**Roe v. Scanlan**, 98 Ky. 24, 32 S. W. 216, 17 Ky. L. 595.

Public buildings. **Quinlan v. Russell**, 94 N. Y. 350; **Clark v. Haggerty**, 5 Ohio C. C. 235, 3 Ohio Cir. Dec. 118.

⁶ **Graf v. Cunningham**, 109 N. Y. 369, 16 N. E. 551; **McKee v. Rapp**, 35 N. Y. Supp. 175, 69 N. Y. St. 291.

⁷ **In re Christie Mfg. Co.**, 15 Misc. (N. Y.) 588, 36 N. Y. Supp. 923.

the court will secure the subcontractor's right to be paid from such land.⁸ Where all parties are in court, a court of equity will protect subcontractor's claims on equitable principles.⁹ Moneys turned over to a third person by the owner on the order of the contractor may amount to a payment to the contractor,¹⁰ and will relieve the owner from liability to a subcontractor's lien.¹¹ This will be true where the owner accepted an order before he was served with proper notice.¹² Especially is this true as to the amount due at the time the order is accepted.¹³ It is sometimes held to cover money due thereafter.¹⁴ Failure to demand payment of the order will not de-

⁸ *Anderson v. Huff*, 49 N. J. Eq. 349, 23 Atl. 654.

⁹ *Brush Electric Co. v. Warwick Elec. Light Mfg. Co.*, 6 Ohio Dec. 475, 4 Ohio N. P. 279. There must be no collusion. *Owen v. Murry*, 6 Ohio Dec. 223, 4 Ohio N. P. 151.

¹⁰ *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118.

¹¹ *New Jersey*.—*South End Imp. Co. v. Harden* (N. J. Eq.), 52 Atl. 1127; *Leary v. Lamont* (N. J. Eq.), 42 Atl. 97; *Slingerland v. Binns*, 56 N. J. Eq. 413, 39 Atl. 712.

New York.—*Bates v. Salt Springs Nat. Bank*, 157 N. Y. 322, 51 N. E. 1033; *Mechanics' &c., Nat. Bank v. Winant*, 123 N. Y. 365, 25 N. E. 262.

Texas.—*Harris Co. v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. 467n.

¹² *Indiana*.—*Raleigh v. Tossettel*, 36 Ind. 295.

Iowa.—*Cutler v. McCormick*, 48 Iowa 406.

New Jersey.—*Blauvelt v. Fuller*, 66 N. J. L. 46, 48 Atl. 538; *Foster v. Rudderow* (N. J. L.), 3 Atl. 694.

New York.—*Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229; *Mayer*

v. Killilea, 63 App. Div. (N. Y.) 318, 71 N. Y. Supp. 786.

Ohio.—*Copeland v. Manton*, 22 Ohio St. 398; *Tollheis v. James*, 7 Ohio C. C. 386.

An accepted order is a payment that will protect an owner. *Jennings v. Willis*, 22 Ont. 439; *House v. Schultz*, 21 Tex. Civ. App. 243, 52 S. W. 654.

¹³ *First Nat. Bank v. Perris Irrigation Dist.*, 107 Cal. 55, 40 Pac. 45; *Bourget v. Donaldson*, 83 Mich. 478, 47 N. W. 326.

¹⁴ An assignment, in language operating in present, of money due and to grow due from a third person, effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor; and after such assignment the debtor no longer owes the assignor, but does owe and will owe to the assignee what he would otherwise owe to the assignor. *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922. See also *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118, also 69 App. Div. (N. Y.) 361, 75 N. Y.

feat its priority.¹⁵ According to some courts the order will take priority of the lien if presented before notice of the lien is served though not accepted until thereafter.¹⁶ But the order must be given in good faith,¹⁷ and must be an assignment of the principal debt.¹⁸ It must be based upon another consideration than a pre-existing indebtedness,¹⁹ or money advanced.²⁰ In such cases the fact that the owner knows that subcontractors are unpaid, will not defeat the rights of the assignee.²¹ Where subcontractors are defeated by an assignment of what is due, the fact that the contractor has given bond to indemnify the owner's agent against claims of subcontractors will not inure to the benefit of the subcontractor.²² If a payment is due and notice is not given as required, the payment may be legally assigned and a subsequent notice will not affect it.²³ If however, the principal contractor can not collect the claim himself, then he can not make an assignment of it, that will preclude subcontractors.²⁴ A person completing a building, abandoned by a contractor is usually held to stand in the shoes of the

Supp. 466; *Frederick v. Goodman St. Homestead Assn.*, 75 Hun (N. Y.) 612, 29 N. Y. Supp. 1041; *Hondorf v. Atwater*, 75 Hun (N. Y.) 369, 27 N. Y. Supp. 447; *Young Stone Dressing Co. v. St. James' Church*, 61 Barb. (N. Y.) 489; *Oates v. Haley*, 1 Daly (N. Y.) 338.

¹⁵ *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118.

¹⁶ *Fell v. McManus* (N. J.), 1 Atl. 747; *Smith v. Sheltering Arms*, 89 Hun (N. Y.) 70, 35 N. Y. Supp. 62; *Newman v. Levy*, 84 Hun (N. Y.) 478, 32 N. Y. Supp. 557; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229.

¹⁷ *English v. Warren*, 65 N. J. Eq. 30, 54 Atl. 860; *South End Imp. Co. v. Harden* (N. J. Eq.), 52 Atl. 1127.

¹⁸ *South End Imp. Co. v. Harden* (N. J. Eq.), 52 Atl. 1127; *Gass v. Souther*, 46 App. Div. (N. Y.) 256, 61 N. Y. Supp. 305.

¹⁹ *Copeland v. Manton*, 22 Ohio St. 398.

²⁰ *Hamilton v. Stilwaugh*, 11 Ohio C. C. 182, 5 Ohio Cir. Dec. 324.

²¹ *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385.

²² *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Dorestan v. Krieg*, 66 Wis. 604, 29 N. W. 576.

²³ *Adams v. Wells*, 64 N. J. Eq. 211, 53 Atl. 610; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270, also 52 Hun (N. Y.) 191, 5 N. Y. Supp. 161.

²⁴ *Jennings v. Willer* (Tex. Civ. App.), 32 S. W. 24; *Texas Builders'*

contractor under the principal contract.²⁵ Of course if the statute forbids an assignment of the money due, an assignment will be invalid.²⁶ The owner rests under no obligation to accept orders for a part of a payment due.²⁷ The rights of the subcontractor in the case of the insolvency of the principal contractor are the same whether he makes an assignment for the benefit of creditors or is placed in the hands of a receiver.²⁸ The mechanic's claim will be superior to that of a general creditor,²⁹ and can be enforced for what was furnished up to the date of assignment,³⁰ even if the assignment is made before the lien claim is filed.³¹ The same rules apply to the claims of contractors under a subcontractor.³²

Supply Co. v. Nat. Loan & Inv. Co., 22 Tex. Civ. App. 349, 54 S. W. 1059.

²⁵ *Smith v. Lange*, 81 App. Div. (N. Y.) 192, 80 N. Y. Supp. 1078; *Harley v. Mapes Reeves Const. Co.*, 33 Misc. (N. Y.) 626, 68 N. Y. Supp. 191; *Moore v. Dugan*, 179 Mass. 153, 60 N. E. 488. A requirement in a building contract that a certificate from the clerk shall be required that no liens are unsatisfied is for the owner's protection, and does not prevent assignments by the contractor. *Bates v. Salt Springs Nat. Bank*, 157 N. Y. 322, 51 N. E. 1033.

²⁶ *Simpson v. New Orleans*, 109 La. 897, 33 So. 912; *Franklin bank v. Cincinnati*, 10 Ohio Dec. 545.

²⁷ *Miller v. Brigot*, 8 La. 533.

²⁸ *Pierce v. Cabot*, 159 Mass. 202, 34 N. E. 362.

²⁹ *John P. Kane Co. v. Kinney*, 35 Misc. (N. Y.) 1, 71 N. Y. Supp. 8.

³⁰ *Mandeville v. Reed*, 13 Abb.

Pr. (N. Y.) 173; *Henderson v. Sturgis*, 1 Daly (N. Y.) 336.

³¹ *John P. Kane Co. v. Kinney*, 35 Misc. (N. Y.) 1, 71 N. Y. Supp. 8; *McMurray v. Hutcheson*, 59 How. Pr. (N. Y.) 210; *Crist v. Langhorst*, 5 Ohio Dec. (Re.) 352, 1 Wkly. Law Bull. 111. If paid before assignment, the same being due, and before notice, there is no lien. *French v. Bauer*, 16 Daly (N. Y.) 309, 11 N. Y. Supp. 69.

³² *French v. Bauer*, 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560n; *Crane v. Genin*, 60 N. Y. 127; *Lumbard v. Syracuse, &c., R. Co.*, 55 N. Y. 491; *Hagan v. American Baptist Home Missionary Soc.*, 14 Daly (N. Y.) 131, 6 N. Y. St. 212; *Lemieux v. English*, 19 Misc. (N. Y.) 545, 43 N. Y. Supp. 1066. If the aggregate of claims for which liens are filed exceeds the balance in the owner's hands, such balance should be distributed pro rata, and if the owner has paid some claims he should only be allowed a pro rata credit therein. *Pierce v. Plumb*, 74 Ill. 325.

§ 67. **Payment to principal contractor as affecting those not under direct contract with the owner.**—Unless the statute in some manner directs otherwise the owner may make payment to the principal, in any method and at any time that he chooses,¹ the claim of the subcontractor not extending beyond the indebtedness of the owner to the contractor.² Such payments must be made in good faith and without intent to commit a fraud.³ The payment, however, must be a valid one; thus an agreement to pay debts of the contractor, being invalid under the statute of frauds if not in writing, is not a valid pay-

¹ **California.**—*Dunlop v. Kennedy* (Cal), 34 Pac. 92.

Illinois.—*Simonton v. Cicero Lumber Co.*, 108 Ill. App. 481.

Louisiana.—*Simpson v. New Orleans*, 109 La. 897, 33 So. 912; *Rousselot v. Kirwin*, 8 La. Ann. 300.

Texas.—*Sunset Brick & Tile Co. v. Stratton* (Tex. Civ. App.), 53 S. W. 703.

Ontario.—*In re Sears & Woods*, 23 Ont. 474, 110 Manitoba 1487, R. S. 1902, ch. 110, p. 1487.

See Dec. & Am. Digest, tit. Mechanics' Liens, § 115. See § 69.

² **Colorado.**—*Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541, 41 Pac. 844.

District of Columbia.—*Whelan v. Young*, 21 D. C. 51.

Florida.—*Macfarlane v. Southern Lumber &c., Co.*, 47 Fla. 271, 36 So. 1029.

Illinois.—*Biggs v. Clapp*, 74 Ill. 335.

New York.—*Robbins v. Arendt*, 148 N. Y. 673, 43 N. E. 165; *Ball, &c., Co. v. Clark, &c., Co.*, 31 App. Div. (N. Y.) 356, 52 N. Y. Supp. 443.

North Carolina.—*Parsley v. David*, 106 N. Car. 225, 10 S. E. 1028.

³ *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. 944; *Martin v. Morgan*, 64 Iowa 270, 20 N. W. 184; *Wolf v. Mendelsohn*, 87 N. Y. Supp. 465. Payments made to the contractor after promises by the owner that he would make no further payments without notice to the subcontractor, are no defense to a lien subsequently filed by such subcontractor. *Rope v. Hess*, 6 N. Y. St. 710. See also *McDougall v. Nast*, 5 N. Y. St. 144; *Smith v. Coe*, 2 Hill (N. Y.) 365; *Hofegsang v. Meyer*, 2 Abb. N. Cas. (N. Y.) 111. The fact that such payment was made to a creditor of the contractor upon the false representation of such creditor that he had assumed all the contractor's debts does not make the payment fraudulent as against the subcontractors, since the owner is not obliged to protect them until they give him the statutory notice. *Burt v. Parker County*, 77 Tex. 338, 14 S. W. 335. See also *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Drall v. Gordon*, 51 Misc. (N. Y.) 618, 101 N. Y. Supp. 171.

ment,⁴ unless it was actually carried into execution before the owner was in some way obliged to hold the money for the subcontractor.⁵ Giving the contractor credit, if done in good faith, and before notice, is considered a valid payment,⁶ and, so, the endorsement by the owner of the contractor's notes.⁷ Under the Iowa statute it has been held that notes will not be a payment unless given to discharge claims that might have been a lien.⁸ Generally, however, where the owner becomes legally responsible to a third person for the debt, it is a payment.⁹ Giving security for the payment of the contract price,¹⁰ or taking goods to be sold and the proceeds held for that purpose, is not a payment,¹¹ nor money paid by the owner for materials to complete the contract.¹² Where the statute makes the owner liable regardless of the state of account between him and the contractor, no payment to the contractor will relieve him from liability to subcontractors.¹³ Where the subcontractor's rights become fixed at the time notice is given, pay-

⁴ *Gridley v. Sumner*, 43 Conn. 14.

⁵ *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Sunset Brick, &c., Co. v. Stratton* (Tex. Civ. App.), 53 S. W. 703; *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.

⁶ *Allen v. Carman*, 1 E. D. Smith (N. Y.) 692.

⁷ *Smith v. Merriam*, 67 Barb (N. Y.) 403.

⁸ *Merritt v. Hopkins*, 96 Iowa 652, 65 N. W. 1015.

⁹ *Gibson v. Lenane*, 94 N. Y. 183; *Garrison v. Mooney*, 9 Daly (N. Y.) 218.

¹⁰ *Gass v. Souther*, 46 App. Div. (N. Y.) 256, 61 N. Y. Supp. 305.

¹¹ *Bartlett v. Mahlum*, 88 Iowa 329, 55 N. W. 514.

¹² *Rodbourn v. Seneca Lake Grape & Wine Co*, 67 N. Y. 215.

¹³ *Indiana*.—*Indiana R. Co. v. Wadsworth*, 29 Ind. App. 586, 64 N. E. 938.

Louisiana.—*Nolte v. Their Creditors*, 6 Mart. (N. S.) (La.) 169.

Maryland.—*Shoop v. Powles*, 13 Md. 304.

Montana.—*Gould v. Barnard*, 14 Mont. 335, 36 Pac. 317.

Missouri.—*Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110; *Henry v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332.

Tennessee.—*Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242. *Washington Code*, 1957, provides that every person performing labor upon, or furnishing materials to be used in, the construction of a building, has a lien therefor, whether furnished at the instance of the owner or his agent, and that, for the purpose of the act,

ment thereafter is made subject to the subcontractor's right.¹⁴ The rule under the majority of statutes is that the owner may pay the principal contractor without liability, until notice has been given in the manner provided by statute.¹⁵ Some statutes do not limit the time for which the owner shall hold the money,¹⁶ while in others a certain length of time is specified, in which case the owner must hold it until the limit has expired.¹⁷ If the owner is bound to withhold payments only after notice is given, then no other knowledge or notice is sufficient except that given in the manner provided by statute.¹⁸ Under the Iowa statute which allows a subcontractor to file his claim within a certain time after his work is done

every contractor shall be held to be the owner's agent. The material man or laborer has a lien, notwithstanding payment to the contractor. *Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. St. 609, 21 Pac. 198.

¹⁴ **California.**—*McCants v. Bush*, 71 Cal. 125, 11 Pac. 601; *Kruse v. Wilson*, 3 Cal. App. 91, 84 Pac. 442.

Illinois.—*Brown v. Lowell*, 79 Ill. 484; *Morehouse v. Moulding*, 74 Ill. 322.

Louisiana.—*Moores v. Wire*, 8 La. Ann. 382; *Rousselot v. Kirwin*, 8 La. Ann. 300.

New York.—*Carman v. McCincrow*, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689; *McMillan v. Seneca Lake Grape & Wine Co.*, 5 Hun (N. Y.) 12.

¹⁵ **California.**—*Kerckhoff - Cuzner Mill, &c., Co. v. Cummings*, 86 Cal. 22, 24 Pac. 814; *Wells v. Cahn*, 51 Cal. 423; *Renton v. Conley*, 49 Cal. 185; *McAlpin v. Duncan*, 16 Cal. 126.

Georgia.—*New Ebenezer Assn. v. Gress Lumber Co.*, 89 Ga. 125,

14 S. E. 892; *Guernsey v. Reeves*, 58 Ga. 290.

Illinois.—*Prescott v. Maxwell*, 48 Ill. 82.

Louisiana.—*Deblieux v. Recorder of Mortgages*, 25 La. Ann. 61.

New York.—*Schneider v. Hobeln*, 41 How. Pr. (N. Y.) 232; *Thompson v. Yates*, 28 How. Pr. (N. Y.) 142; *Carman v. McCincrow*, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689; *Kennedy v. Paine*, 1 E. D. Smith (N. Y.) 651.

Tennessee.—*Brown v. Crump*, 32 Tenn. (2 Swan) 531.

Texas.—*Burt v. Parker County*, 77 Tex. 338, 14 S. W. 335; *Sens v. Trentune*, 54 Tex. 218.

¹⁶ *Crawfordsville v. Johnson*, 51 Ind. 397; *Colter v. Frese*, 45 Ind. 96; *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152.

¹⁷ *Hug v. Hintrager*, 80 Iowa 359, 45 N. W. 1035; *Carey-Lombard Lumber Co. v. Partridge*, 10 Utah 322, 37 Pac. 572.

¹⁸ *Cudworth v. Bostwick*, 69 N. H. 536, 45 Atl. 408; *Taylor v. Wahl*, 72 N. J. L. 10, 60 Atl. 63;

and material furnished, an owner without knowledge of a subcontractor's claim, need not hold the fund until the time limit for filing has expired.¹⁹ However, if the contract did not require such payment but the owner knew the subcontractor did the work, he must withhold payment even though he did not know they were not paid.²⁰ And in making all such payments the owner is put upon inquiry and must act in good faith to be protected.²¹

§ 68. **Advance and premature payments as affecting persons not under direct contract.**—What was said in the preceding section is largely true as to advances and premature payments; unless the statute directs to the contrary, payments so made will be valid.¹ But in order to protect the owner, such payments must be made according to the terms of the contract, and without collusion or fraud.² If made in advance of the time or in a manner otherwise than stipulated in the principal contract, as a general rule the owner will not be protected for the subcontractor has a right to rely upon the conditions of the original contract as to the time and manner of payment.³ An exception has been made where the owner in good faith, to enable the contractor to proceed with the work, has advanced

Kelly v. Bloomingdale, 19 N. Y. Supp. 126, 64 Hun (N. Y.) 634 (without opinion).

¹⁹ *Andrews v. Burdick*, 62 Iowa 714, 16 N. W. 275; *Hug v. Hintrager*, 80 Iowa 359, 45 N. W. 1035.

²⁰ *Othmer v. Clifton*, 69 Iowa 656, 29 N. W. 767; *Fay v. Orison*, 60 Iowa 136, 14 N. W. 213.

²¹ *Chicago Lumber Co. v. Woodside*, 71 Iowa 361, 32 N. W. 381; *Gilchrist v. Anderson*, 59 Iowa 274, 13 N. W. 290.

¹ *Georgia*.—*Allen v. Schweigert*, 113 Ga. 69, 38 S. E. 397.

Iowa.—*Andrews v. Burdick*, 62 Iowa 714, 16 N. W. 275.

Louisiana.—*Miller v. Reynolds*, 5 Mart. (N. S.) (La.) 665.

Tennessee.—*McCrary v. Bristol Bank, &c., Co.*, 97 Tenn. 469, 37 S. W. 543.

Texas.—*Ritter v. Houston Oil Refining & Mfg. Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758. See Dec. & Am. Dig. tit. Mechanics' Liens, § 115.

² *Lind v. Braender*, 15 Daly (N. Y.) 370, 7 N. Y. Supp. 664; *Fitzgibbon v. Green*, 1 W. L. B. 110, 5 Am. Law Rec. 2, 5 Ohio Dec. (Re.) 350.

³ *California*.—*Walsh v. McMenomy*, 74 Cal. 356, 16 Pac. 17.

District of Columbia.—*Riggs*

funds, in which case he is allowed credit for the same, even as against subcontractors. But in such cases it is incumbent upon the owner to show that the money was actually used in the work.⁴ It has been held that payment as the work progressed is not a premature payment, and if the work is practically completed, but not technically so, it will not be an advanced payment.⁵ Neither is it an advanced payment, if it does not exceed that to which the contractor is entitled.⁶ If the statute compels the owner to see that the subcontractor is paid, then all payments otherwise made are premature, and the owner is liable.⁷ Laws requiring the owner to withhold

Fire Ins. Co. v. Shedd, 16 App. (D. C.) 150.

Iowa.—**Green Bay Lumber Co. v. Thomas**, 106 Iowa 154, 76 N. W. 651.

New York.—**Post v. Campbell**, 83 N. Y. 279; **Banham v. Roberts**, 78 Hun. (N. Y.) 246, 28 N. Y. Supp. 828; **Lumbard v. Syracuse R. Co.**, 55 N. Y. 494.

⁴ **Connecticut**.—**Abbey v. Herzer**, 74 Conn. 493, 51 Atl. 513; **Spaulding v. Thompson Ecclesiastical Soc.**, 27 Conn. 573.

Indiana.—**Caulfield v. Polk** (Ind.), 46 N. E. 932.

New York.—**Lynch v. Cashman**, 3 E. D. Smith (N. Y.) 660.

Ohio.—**Schneidhorst v. Luecking**, 26 Ohio St. 47; **Village of Port Clinton v. Cleveland Stone Co.**, 10 Ohio Cir. Ct. 1; **Foeller v. Voight**, 5 Ohio Dec. (Re.) 349, 5 Am. Law Rec. 1, 1 W. L. B. 116.

Georgia.—**Prince v. Neal-Millard Co.**, 124 Ga. 884, 53 S. E. 761; **Tuck v. Moss Mfg. Co.**, 127 Ga. 729, 56 S. E. 1001.

⁵ **Stimson Mill Co. v. Riley** (Cal.), 42 Pac. 1072; **Veitch v.**

Clark, 67 N. J. Eq. 57, 57 Atl. 272; **First Nat. Bank v. Hilliboe** (N. Dak.), 114 N. W. 1085.

⁶ Subcontractors who furnished labor and materials with the knowledge of the owner cannot complain that he paid the contractor in advance of the estimates, under a contract providing for payment of a certain per cent. monthly on estimates of the superintending architect, where it appears that the contractor was not paid more than such percentage for the work actually done, and that, on his default in completing the work, the owner finished it at a total cost greater than the contract price. **Epeneter v. Montgomery County**, 98 Iowa, 159, 67 N. W. 93.

⁷ Acts 1895, § 18, relative to mechanics' liens, providing that the owner or builder shall not be liable for more than the prices agreed on between the owner and contractor providing also that the owner shall pay no money to the contractor until laborers and material men shall have been paid,

payment and making him liable for not so doing, are constitutional.⁸ Where the statute provides that a certain portion shall be held, such part must be retained.⁹ It has been held,

an owner paying money to a contractor on his personal account before a material man was paid in full is liable to the material man for the sum so paid. *Barton v. Grand Lodge, I. O. O. F.*, 71 Ark. 35, 70 S. W. 305; see also, *Green v. Farrar Lumber Co.*, 119 Ga. 30, 46 S. E. 62; *Nelson Mfg. Co. v. Mann*, 24 Ky. L. R. 1547, 71 S. W. 851; *Fourcher v. Day*, 6 La. Ann. 60; *Sierra Nevada Lumber Co. v. Whitmore*, 24 Utah 130, 66 Pac. 779.

⁸ *California*.—*Hicks v. Murray*, 43 Cal. 515.

Indiana.—*Colter v. Frese*, 45 Ind. 96.

Kentucky.—*Hightower v. Bailey*, 108 Ky. 198, 56 S. W. 147.

Massachusetts.—*Bowen v. Phinney*, 162 Mass. 593; *Donahy v. Clapp*, 12 Cush. (Mass.) 440.

Minnesota.—*Laird v. Mornon*, 32 Minn. 358, 20 N. W. 354.

Missouri.—*Heny v. Coalswork*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332.

Nebraska.—*Balton v. Black*, 21 Neb. 131, 31 N. W. 673.

Nevada.—*Hunter v. Truckee Lodge*, 14 Nev. 24.

Tennessee.—*Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

Wisconsin.—*Mallory v. Abattoir*, 80 Wis. 170, 49 N. W. 1071.

United States.—*Jones v. Great Southern, etc., Hotel Co.*, 86 Fed. 370.

⁹ *Barton v. Grand Lodge, I. O. O. F.*, 71 Ark. 35, 70 S. W. 305. Under Code Civ. Proc. 1184, requiring the contract for erecting a building to specify times when payments are to be made, and requiring 25 per cent. of the price to be retained until 35 days after completion, partial payments, however they are specified as to time, may be safely made, provided no notice of their subcontract is given by material men, in the absence of which they must rely on the responsibility of the contractor, and the 25 per cent. required to be retained; and they are not injured by any uncertainty as to the times of payment specified, nor by payments in advance of the specified time. *Dunlop v. Kennedy*, 102 Cal. 443, 34 Pac. 92. See also *Kerckhoff-Cuzner Mill & Lbr. Co. v. Cummings*, 86 Cal. 22, 24 Pac. 814; *Sidlinger v. Kerkow*, 82 Cal. 42, 22 Pac. 932; *Barlow v. Gaffney*, 76 Conn. 107, 55 Atl. 582; *Allen v. Schweigert*, 113 Ga. 69, 38 S. E. 397; *McAuliffe v. Baillie*, 89 Ga. 356, 15 S. E. 474. Civ. Code, 2802, 2803, which require the owner who gives out a contract for the erection of a building on his land to retain 25 per cent. of the contract price, for the benefit of laborers and material men, do not prevent such owner from making partial payments to the contractor from time to time as the work progresses, provided the aggre-

however, that the subcontractor cannot rely upon a stipulation in the contract to retain a certain amount, but he must give the notice required by statute.¹⁰ A subcontractor has the right to rely upon the statute, and if the statute gives him a certain time within which to file his notice, all payments made before the expiration of such time are made at the owner's risk.¹¹ Some courts have held that if the principal contract provides that payment shall be made before the expiration of the time limit for filing claims, the subcontractor is presumed to know of such provision and is bound by it, and if he neglects to file his claim or give notice, and payments are made bona fide, the owner will be protected.¹² In Iowa it is held that the owner to be protected must have no knowledge of the subcontractor's claim,^{12a} and in Illinois that the contractor must give the owner a list of subcontractors, or the subcontractor must give notice,¹³ but under a later de-

gate of such payments does not exceed 75 per cent. of the contract price. *Hunnicut v. Van Hoose*, 111 Ga. 518, 36 S. E. 669; see also *Green Lumber Co. v. Nutriment Co.*, 113 Ill. App. 635; *Campbell v. Green, etc., Lumber Co.*, 99 Ill. App. 647. Under Comp. St. c. 54, § 2, all payments within 60 days, by the owner of the building to the original contractor, will be at his own risk, and, against one furnishing material for the construction of the building, the fact that the original contractor is indebted to the owner will not prevent the material man from enforcing his lien for such material against such building, and the lot on which it stands. *Ballou v. Black*, 21 Neb. 131, 31 N. W. 673; see also *Torrance v. Cratchley*, 31 Ont.

546; *McArthur v. Dewar*, 3 Manitoba 72.

¹⁰ *James v. St. Paul's Sanitarium*, 24 Tex. Civ. App., 60 S. W. 322.

¹¹ *Illinois*.—*Havighorst v. Lindberg*, 67 Ill. 463.

Kansas.—*Shellabarger v. Thayer*, 15 Kan. 619.

Nevada.—*Lonkey v. Cook*, 15 Nev. 58; *Hunter v. Truckee Lodge No. 14*, 14 Nev. 24.

South Dakota.—*Albright v. Smith*, 2 S. Dak. 577, 51 N. W. 590.

¹² *Merritt v. Hopkins*, 96 Iowa, 652, 65 N. W. 1015; *Winter v. Hudson*, 54 Iowa 336, 6 N. W. 541; *Courtat v. Ehrhardt*, 28 W. L. B. Ohio 138; *McKnight v. Washington*, 8 W. Va. 666.

^{12a} See § 67, note 19.

¹³ *Butler v. Gain*, 128 Ill. 23, 21 N. E. 350; *Shaw v. Chicago*

cision it is held that a failure to give such statement does not protect the owner, and he pays at his peril.¹⁴ The subcontractor may waive his rights.¹⁵ Under the New Jersey statute, the owner upon payment to the contractor may require that he give releases from all the subcontractors, and if the owner pays without requiring such release, he does so at his peril.¹⁶

§ 69. **Wrongful payment by owner—Ohio statutes.**—Section 3203 is as follows: If by collusion or fraud, the owner, board, officer, or the authorized clerk or agent thereof, pay in advance of the payments due under the contract, and thereby diminish the amount of funds for such laborer, mechanic, subcontractor, or material man he shall be liable to such laborer, mechanic, subcontractor or material man to the amount that would have been due on such contract at the date of filing of an account and affidavit in such manner as if no payment had been made.¹ This section by its negatory provisions, recognizes the doctrine that all payments in good faith, made before notice, will be considered as valid for the protection of the owner,

Sash, Door & Blind Mfg. Co., 144 Ill. 520, 33 N. E. 870; see § 72, note 4.

¹⁴ *Hintze v. Weiss*, 45 Ill. App. 220; *Chicago Sash Mfg. Co. v. Shaw*, 44 Ill. App. 618, 33 N. E. 870; *Wieska v. Imroth*, 43 Ill. App. 357; *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.

¹⁵ *Burnside v. O'Hara*, 35 Ill. App. 150.

¹⁶ A release of claims executed by only a portion of the laborers and material men, to which was annexed an affidavit of the contractor showing that some of the laborers and material men had not joined in the release, was not

a compliance with Act March 29, 1892, supplementing the mechanic's lien law; and hence a payment by the owner to the contractor of money due on the contract on presentation of such release and affidavit, did not operate as a bar to such claims as remained unreleased and unsatisfied. *Magowan v. Stevenson*, 58 N. J. L. 31, 32 Atl. 1057; *Bruce v. Pearsall*, 59 N. J. L. 62, 34 Atl. 982; *Anderson Lumber Co. v. Friedlander*, 54 N. J. L. 375, 24 Atl. 434.

¹ Ohio Laws 99, p. 503; see § 68.

and should be liberally construed to that effect.² The word "collusion" here, does not simply mean in advance.³ Where a building is not completed within the time contracted for, the owner may settle in full with the contractor.⁴

§ 70. **Wrongful payment by owner—Ohio statute—what are advance payments.**—This section (3203) merely means, that the owner should not be held liable, unless his payment works a fraud on the rights of material men, and others, which fact will not be presumed, but must be proven as in other cases. Advance payments are not such as the owner may make to the contractor to enable him to complete the work.¹ Payments made on estimates of a superintending architect, are not advance payments, so as to make an owner liable to material men.² Payment to a contractor, under a contract to build a house for a gross sum, of more than the contract required, if made before notice of claims is not a constructive fraud, although payment is made by the owner without taking care to ascertain facts as to the claims of the material men.³ Unauthorized payment to a contractor by a loan company, out of money borrowed for building purposes, must be made good by said company.⁴ The owner may set off a valid claim he may have against the contractor, against the claim of a subcontractor.⁵

² *Tollhels v. James*, 11 Ohio Dec. (Re.) 213, 25 Ohio L. Bull. 277, 4 Ohio Cir. Dec. 646, 7 Ohio C. C. 386.

³ *Feldner v. Voight*, 1 Ohio L. Bull. 116, 7 Ohio Dec. (Re.) 109, 4 Am. L. Rec. 671, 5 Am. L. Rec. 1, 1 Law Bull. 116, 5 Dec. (Re.) 336, 349; *Strum v. Ritz*, 1 Ohio L. Bull. 150; 7 Dec. (Re.) 135.

⁴ *Fitzgibbon v. Green*, 1 Ohio L. Bull. 110, 7 Ohio Dec. (Re.) 99, 5 Ohio Dec. (Re.) 350, 5 A. L. Rec. 2.

¹ *Schneidhorst v. Luecking*, 26 Ohio St. 47.

² *Clements v. Hamilton Co.*, 5 Ohio Dec. (Re.) 126, 2 A. L. Rec. 729.

³ *Hayes v. Locke*, 33 Ohio L. Bull. 228, 1 O. S. U. 303.

⁴ *Kesting v. Donahue*, 5 Ohio Dec. 153, 7 Ohio (N. P.) 377, affirmed, 6 Ohio Cir. Dec. 262, 13 Ohio C. C. 653, 2 Ohio Dec. 567.

⁵ *Stark v. Simmons*, 54 Ohio St. 435, 43 N. E. 999.

CHAPTER 3.

PROCEEDINGS REQUIRED ON PART OF CLAIMANT TO PERFECT LIEN.

Sec.

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| <p>Sec.</p> <p>100. Claim or statement—Form and contents.</p> <p>101. Claim or statement—Designation of parties and description of building.</p> <p>102. Claim or statement—Notice of intention to claim.</p> <p>103. Claim or statement—Description of property.</p> <p>104. Claim or statement—Portion of land to be described.</p> <p>105. Claim or statement—Description of building—Error.</p> <p>106. Claim or statement—Averment of ownership.</p> <p>107. Claim or statement—Peculiar ownership.</p> <p>108. Claim or statement—Description of services or material.</p> <p>109. Claim or statement—Sufficient description of material.</p> <p>110. Claim or statement—Averment of contract with or consent of owner.</p> <p>111. Claim or statement—Terms of contract.</p> | <p>Sec.</p> <p>112. Claim or statement—Name of employer or contractor.</p> <p>113. Claim or statement—Time of rendering services.</p> <p>114. Claim or statement—Sufficiency as to time.</p> <p>115. Claim or statement—Averment of amount due.</p> <p>116. Claim or statement—Itemized account.</p> <p>117. Claim or statement—Sufficiency of detail.</p> <p>118. Claim or statement—Signature of claimant.</p> <p>119. Claim or statement—Verification.</p> <p>120. Claim or statement—Verification, continued.</p> <p>121. Claim or statement—Errors and defects.</p> <p>122. Claim or statement—Errors and defects, continued.</p> <p>123. Claim or statement—Amendment of.</p> <p>124. Claim or statement—Cancellation of.</p> |
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§ 71. Statute must be followed and lien perfected.—The preceding chapters have been occupied with a consideration of the interests and estates liable to a mechanic's lien and the conditions under which a claimant is entitled thereto. These matters are conditions precedent to the existence of a lien. But something more is needed to make the right effective, and it is the purpose of this chapter to consider the steps required of a claimant to perfect a lien to which he is entitled under the rules heretofore developed. The courts are not agreed on the question whether the procedure is a substantive or remedial part of the law. Many of the courts hold to the principle of strict construction and require a strict compliance with

statutory provisions relating to this procedure.¹ Other courts, however, hold to a liberal construction and are satisfied with a substantial compliance with the statute in matters of proceedings to perfect liens. In the opinion of the writer the better reason is with these courts, and their rule of liberal construction should prevail.² The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions.³ No uniform rule as to what must be done can be given; the particular statute of each state must be consulted and then followed as closely as practicable, so that substantial justice may be worked out to all parties concerned.⁴

¹ *Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629. The statute is more than remedial; it creates new rights or liability as well as a new remedy, and being in derogation of the common law, should be strictly rather than liberally construed. *Newell v. Campbell Mach. Co.*, 17 R. I. 74, 20 Atl. 158; *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010, *Thurston v. Prentiss*, 1 Mich. 193; *Bassett v. Carleton*, 32 Me. 553; *Renwick v. Morris*, 7 Hill (N. Y.) 575.

² The act must be construed, so as to render the greatest amount of benefit to those for whose interest it was made, and at the same time, to save from injury the other class of persons upon whom it operates, as far as practicable. *Patrick v. Ballentine*, 22 Mo. 143. While the 41st section of the Mechanics' Lien Law requires a liberal construction, it is nevertheless necessary that it should be substantially complied with, before a party can be successful in a court of equity. *Her-*

mann v. Mertens, 87 Md. 725, 39 Atl. 618. This statute is highly remedial, and courts should not indulge in such niceties of construction, or such useless requirement in practice under it as will tend to defeat its object without resulting in any good end. *Gilman v. Gard*, 29 Ind. 291; *Hess v. Poultney*, 10 Md. 257. To render a mechanics' lien valid, it must appear upon its face that all the provisions of the statute necessary to its creation have been substantially complied with. *United States Blowpipe Co. v. Spencer*, 61 W. Va. 191, 56 S. E. 345.

³ *Putnam v. Ross*, 46 Mo. 338; *Hall v. Erskitz*, 125 Mich 332, 84 N. W. 310.

⁴ *Wees v. Elbon*, 61 W. Va. 380, 56 S. E. 611. Though the lien of a material man is recognized by the constitution, the statute prescribing the method of preserving a lien must be complied with, or it will not prevail as against third persons. *Kinsey v. Spurlin*, (Tex. Civ. App.) 102 S. W. 122.

§ 72. **Notice to owner generally.**—It is against the principles relating to the ownership of property that a lien should be fastened thereon without the owner's knowledge. Therefore, unless the statute in some manner makes the owner directly liable to a subcontractor or material man,¹ such subcontractor or material man is required to give notice of his claim.² Under some statutes when the owner makes a contract for material, he impliedly agrees that the subcontractor and material men may have a lien on his property. This is particularly true under the Pennsylvania system, where the lien of subcontractors and material men is directly against the owner. Under the New York System the subcontractor and material man work out their claims through the principal contractor. Where the contract is directly with the owner, generally no notice is re-

¹ **California.**—*Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 841, 22 Pac. 860; *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509.

Massachusetts.—*Whitford v. Newell*, 2 Allen (84 Mass.) 424.

Michigan.—*Kerr-Murray Mfg. Co. v. Kalamazoo Heat Co.*, 124 Mich 111, 82 N. W. 801; *Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. 549.

Oregon.—*Ainslie v. Kohn*, 16 Ore. 363, 19 Pac. 97. Should be liberally construed. *McNab, &c., Mfg. Co. v. Paterson Bldg. Co.* (N. J. Eq.) 63 Atl. 709; see Dec. and Am. Dig. tit. *Mechanics' Lien*, § 117.

² **California.**—*Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512.

Colorado.—*Slickman v. Wollett*, 31 Colo. 58, 71 Pac. 1107.

Florida.—*Scott v. Hempel*, 33 Fla. 313, 14 So. 840.

Illinois.—*Mantonya v. Reilly*, 184 Ill. 183, 56 N. E. 425; also 83 Ill. 275; *Green & Lombard Lum-*

ber Co. v. Bain, 77 Ill. App. 17; see § 56.

Indiana.—The personal liability of the owner to a material man, given by Rev. St. 1876, p. 266, § 649, and the lien on the property accorded by § 650, are distinct and independent remedies; and, to hold the owner personally, a notice to that effect, and not a notice of intention to create a lien, is necessary. *Crawford v. Crockett*, 55 Ind. 220. See also *Sultzser-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 62 N. E. 649, 65 N. E. 583.

Louisiana.—*Stewart v. Christy*, 15 La. Ann. 325.

Missouri.—*Kasper v. St. Louis Terminal Ry Co.*, 101 Mo. App. 323, 74 S. W. 145.

New Hampshire.—*Bixby v. Whitcomb*, 69 N. H. 646, 46 Atl. 1049; *Lawson v. Kimball*, 68 N. H. 549, 38 Atl. 380.

New Jersey.—*Beckhard v. Rudolph*, 68 N. J. Eq. 315, 59 Atl.

quired to hold the owner personally.³ Where the statute requires the contractor to give the owner a list of the subcontractors and provides a penalty, yet the failure to do this does not relieve the subcontractor from giving notice.⁴ But if the statute provides that the owner shall not pay the contractor, without a statement of the subcontractor's claims, the owner is liable, even though the subcontractor did not give notice.⁵

§ 73. **Notice to owner—Waiver.**—If the owner agrees with the contractor to pay the subcontractor, then the subcontractor is relieved from giving notice,⁶ the owner in this manner having waived his right.⁷ The persons who have the right to profit by the giving of the notice are those mentioned in the

253; Bayonne Building Assn. No. 2 v. Williams, 59 N. J. Eq. 617, 43 Atl. 669; Ter Knill v. Reddick, (N. J. Eq.) 39 Atl. 1062.

Nevada.—Coscia v. Kyle, 15 Nev. 394.

New York.—Kenney v. Apgar, 93 N. Y. 539; Whipple v. Christian, 80 N. Y. 523.

Pennsylvania.—Mehl v. Fisher, 13 Pa. Super. Ct. 330.

Texas.—James v. St. Paul's Sanitarium, 24 Tex. Civ. App. 664, 60 S. W. 322.

³ **Illinois.**—Le Forgee v. Colby, 69 Ill. App. 443.

Michigan.—Lamont v. La Fevre, 96 Mich. 175, 55 N. W. 687.

Missouri.—Squires v. Fithian, 27 Mo. 134.

Pennsylvania. — Appeal of Stormfeltz, 135 Pa. 604, 19 Atl. 950; Appeal of Stoner, 135 Pa. 604, 19 Atl. 949; Compton v. Sankey, 29 C. C. 251, 13 Dist. Pa. 535, 7 Dauph. Co. Ct. (Pa.) 215, 9 North 281; Hoopes v. Greer, 9 Del. Co. Ct. (Pa.) 162; Mock v.

Roscoe, 9 Del. Co. Ct. (Pa.) 286; Crider v. McCafferty, 13 Dist. (Pa.) 638.

Rhode Island.—Poole v. Fellows, 25 R. I. 64, 54 Atl. 772.

South Carolina.—Matthews v. Monts, 61 S. Car. 385, 39 S. E. 575. Ohio statute requires notice before lien can be on property, § 81.

⁴ Pinkston v. Young, 104 N. Car. 102, 10 S. E. 133; see § 68, notes 13, 14.

⁵ Keeley Brewing Co. v. Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923.

⁶ Ryndak v. Seawell, 13 Okla. 737, 76 Pac. 170.

⁷ White v. Washington School Dist. 42 Conn. 541. Where it appears that, before paying the contractor, the owner knew of a claim for a lien for materials furnished him, and required him to give bond of indemnity against it, failure of the material man to give notice of his claim in the time and manner prescribed by

statute. Notice by others will not acquire for them such right.⁸ And all conditions precedent must have been complied with.⁹

§ 74. Notice to owner—To whom given.—The notice should be given to the person who is sought to be held responsible for payment of the claim, and this means the owner of the property.¹⁰ The provisions of the statute regulate this matter and must be complied with.¹¹ Generally the notice may be given to an agent, if it is properly within the scope of the agent's authority.¹² It cannot, however, be made upon an agent

statute will not defeat it. *Padgett v. Dallas Brick & Construction Co.*, Tex. Civ. App., 51 S. W. 529.

⁸ *Burst v. Jackson*, 10 Barb. (N. Y.) 219; see Dec. & Am. Dig. tit. Mechanics' Liens, § 119.

⁹ *Mears v. Stubbs*, 45 Iowa 675.

¹⁰ *Richards v. O'Brien*, 173 Mass. 332, 53 N. E. 858; *Hall v. Erskitz*, 125 Mich. 332, 84 N. W. 310; *Poole v. Fellows*, 25 R. I. 64, 54 Atl. 772. See *Estate Hable*, secs. 10 and 11; ownership, sec. 24.

¹¹ Where the title to certain property was in a Roman Catholic Bishop, and the priest of a church within his diocese employed the contractor to construct a church building thereon, one furnishing materials for the contract and desiring to retain a lien therefor, should give notice to the bishop, and not the priest, under Code 1979. *Gross v. Butler*, 72 Ga. 187. Under Laws 1892, c. 687, § 3, constituting school districts municipal corporations, the board of education of the city of Brooklyn, being subject to the duties of trustees of common

schools, and vested with the title to all school property, is a separate corporation from the city itself; and service of notice of mechanics' liens against the district (Laws 1878, c. 315, as amended by Laws 1892, c. 629), should be made on the city treasurer, as financial officer of the board. *Yellow Pine Co. v. Board of Education*, 15 Misc. (N. Y.) 58, 36 N. Y. Supp. 922.

¹² A husband, *Peck v. Hensley*, 21 Ind. 344; a city attorney, *Ausbeck v. Schardien*, 20 Ky. L. 178, 45 S. W. 507; *Rimney v. Getterman*, 63 Md. 424; a bookkeeper, *Wiltsie v. Harvey*, 114 Mich. 131, 72 N. W. 134. Evidence that a person acted as agent for defendant in settling a contract for building a house, and in making some payments thereon, does not show that he was agent to accept a notice of a mechanics' lien. *Anderson v. Volmer*, 83 Mo. 403; *Smith-Anthony Stove Co. v. Speer*, 65 Mo. App. 87, 2 Mo. App. Rep'r. 1250; *Shaw v. Bryan*, 39 Mo. App. 523. Under Rev. St. 3190, requir-

if the statute requires it to be made on the "true owner."^{12a} For this purpose, the person who is the owner at the time the lien attached,¹³ is the person to whom the notice should be given.¹⁴ A purchaser, where the building is in process of construction at the time of sale, is the proper person to whom the notice should be given.¹⁵ A safer rule, however, is to give notice to both seller and buyer.¹⁶ A tenant by curtesy, where it is sought to hold his interest,¹⁷ or executor,¹⁸ or cestui que trust may properly be served.²⁰ But one who holds title for the fraudulent protection of another, or an official not

ing a subcontractor to give notice to the owner or agent of intention to file a lien, a person charged by a non-resident owner with the duty of approving all bills or demands prior to their payment, is the owner's agent, on whom notice may be served. *Johnson v. Barnes, etc., Bldg. Co.*, 23 Mo. App. 546; *Henry v. Bunker*, 22 Mo. App. 650.

Building Committee.—The requirement of the statute that notice of a claim for a lien shall be served on the owner of the building or his agent is complied with by service on a member of a building committee of an unincorporated society. *Padgitt v. Dallas Brick & Construction Co. (Tex. Civ. App.)*, 51 S. W. 529; see also, *McCreary v. Waco Lodge No. 70, I. O. O. F.*, 2 Tex. Unrep. Cas. (Posey) 675; *Laev Lumber Co. v. Auer*, 123 Wis. 178, 101 N. W. 425; *Pou v. Covington, etc., R. Co.*, 84 Ga. 311, 10 S. E. 744; *American Car & Foundry Co. v. Alexandria Water Co.*, 215 Pa. 520, 64 Atl. 683.

^{12a} *Bullard v. Dudley*, 101 Ga. 299, 28 S. E. 845.

¹³ *Kuhleman v. Schuler*, 35 Mo. 142.

¹⁴ *Lefler v. Forsberg*, 1 App. D. C. 36.

¹⁵ *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010; *Miller v. Barroll*, 14 Md. 173. Where materials are furnished for a building under a contract with a person holding a contract to purchase, but who had no title to the land at the time, and the contractor did not give notice in writing to the owner of the land that he intended to claim a lien for such materials, as required by Pub. St. c. 191, § 3, he was not entitled to a lien as against a mortgagee of the purchaser. *McDowell v. Rockwood*, 182 Mass. 150, 65 N. E. 65.

¹⁶ *Porter v. Lively*, 45 Ga. 159.

¹⁷ *Meyer v. Christian*, 64 Mo. App. 203, 2 Mo. App. Rep'r. 1060.

¹⁸ *Bruner Granitoid Co. v. Klein*, 100 Mo. App. 289, 73 S. W. 313.

²⁰ *Lamb v. Campbell*, 19 Ill. App. (19 Bradw.) 272; see § 28.

within the scope of his duties is not a proper person.²¹ Where the contract is with a firm, the notice should be given to the firm.²² However, if the partnership was formed after the contract, it should be given to the person with whom the contract was made.²³

§ 75. Notice to owner—When given.—The notice must be given within the time limited by law,¹ the court having no power to extend the time beyond that limit.² The owner, however, may waive it.^{2a} If the statute allows the notice to be given within ten days after completion and the contractor abandons the work, the notice should be given within ten days after its abandonment.³ And if the notice must be given within twenty days after payment should have been made, it should be given within that time after the goods are delivered.⁴ Usually in such cases notice may be given before the expiration of the time limited,⁵ but not if the statutes direct otherwise.⁶ In calculating time, it is reckoned by excluding the first day and counting the last, counting forward,⁷ or back-

²¹ *Baltis v. Friend*, 90 Mo. App. 408; *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173, 81 App. Div. 460.

²² *Reindollar v. Flickinger*, 59 Md. 469.

²³ *Lapenta v. Lettieri*, 72 Conn. 377, 44 Atl. 730.

¹ *District Columbia*.—*Emack v. Campbell*, 14 App. D. C. 186.

Illinois.—*St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *O'Brien v. Graham*, 33 Ill. App. 546.

Missouri.—*Patrick v. Ballentine*, 22 Mo. 143.

Rhode Island.—*Mowry v. Hill*, 14 R. I. 504; see Dec. & Am. Dig. tit. Mechanics' Liens, § 121.

² *Adler v. Lumley*, 61 N. Y. Supp. 688, 46 App. Div. 229.

^{2a} *Ombony v. Jones*, 21 Barb. (N. Y.) 520.

³ *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282.

⁴ *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728; *Metz v. Lowell*, 83 Ill. 565; *Kelly v. Kellogg*, 79 Ill. 477.

⁵ *Waterbury Lumber & Coal Co. v. Coogan*, 73 Conn. 519, 48 Atl. 204; *Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899.

⁶ *Catlin v. Douglass*, 33 Fed. 569.

⁷ *Hahn v. Dierkes*, 37 Mo. 574; *Schubert v. Crowley*, 33 Mo. 564.

ward.⁸ It must be given while the owner has funds in his hands due the contractor, according to the original contract.⁹ Even if notice be not given within the required time, and the owner still has funds in his hand, it is not safe for the owner to pay such amount to the principal contractor.¹⁰ Under the New Jersey law before notice can be given there must be a demand and refusal on the part of the principal contractor.¹¹ Where the statute says that the notice should be given within a certain time after the completion of the subcontractor's contract, it should be given with reference to the time of completion of the principal contract.¹² Generally when the law is changed, and the new law extends the time, the notice will be given in time if within the extended time,¹³ the law as amended controlling.¹⁴ In calculating time, separate jobs or contracts cannot be tacked together, the notice for each must be within the time limit of each.¹⁵ But if it is all one continuous contract, although performed at different times, time would begin to run from the last item.¹⁶ Time cannot be ex-

⁸ *Paterson v. St. Thomas' Church*, 18 R. I. 349, 27 Atl. 449.

⁹ *Person v. Herring*, 63 N. J. L. 599, 44 Atl. 753; *Donnelly v. Johns*, 58 N. J. Eq. 442, 44 Atl. 180.

¹⁰ *First Nat. Bank v. Perris*, Irr. Dist., 107 Cal. 55, 40 Pac. 45; *Board of Education v. Blake*, (Cal.) 38 Pac. 536.

¹¹ *Williams v. Bradford* (N. J. Eq.), 21 Atl. 331; see § 76, note 14.

¹² *Bassett v. Bertorelli*, 92 Tenn. 548, 22 S. W. 423.

¹³ *Pue v. Hetzell*, 16 Md. 539; *Cole Mfg. Co. v. Falls*, 92 Tenn. 607, 22 S. W. 856.

¹⁴ *Lane v. Thomas*, 25 Ohio Cir. Ct. 303.

¹⁵ *Illinois*.—*Sheehan v. South River Brick Co.*, 111 Ga. 444, 36 S. E. 759.

Maryland.—*Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575; *Watts v. Whittington*, 48 Md. 353.

Rhode Island.—*Newell v. Campbell Mach. Co.*, 17 R. I. 74, 20 Atl. 158.

Ontario.—*Morris v. Tharle*, 24 Ont. R. 159; re *Moorehouse*, 13 Ont. 290; see § 76, note 9.

¹⁶ *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575; *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323; otherwise if not continuous; *South End Imp. Co. v. Harden*, (N. J. Eq.) 52 Atl. 1127; *Aubin v. Darling*, 26 R. I. 469, 59 Atl. 390; whether the contract was continuous or not is a question for the jury; *Treusch v. Shryock*, 51 Md. 162.

tended by doing minor details.¹⁷ Long interruptions between items must be explained.¹⁸

§ 76. **Notice to owner—Form and requisites.**—Statutes do not usually prescribe a particular form of notice, but where the statute says that the notice shall contain certain things these requirements must be complied with.¹ The failure to do so will be fatal to the lien.² A substantial compliance, however, is all that is required.³ In the absence of statutory requirements on the subject a notice which shows the amount claimed,⁴ to whom furnished, and upon what the improvement is claimed, is usually regarded as sufficient.⁵ A statutory re-

¹⁷ *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 62 N. E. 649, 65 N. E. 583; *Hermann v. Mertens*, 87 Md. 725, 39 Atl. 618.

¹⁸ *Taylor v. Dall Lead & Zinc Co.*, 131 Wis. 348, 111 N. W. 490.

¹ *Merritt v. Hopkins*, 96 Iowa 652, 65 N. W. 1015; *Beckhard v. Rudolph*, 68 N. J. Eq. 315, 59 Atl. 253; see Dec. & Am. Dig. tit. *Mechanics' Liens*, § 122; see §§ 81, 82.

² *Hess v. Poultney*, 10 Md. 257; *Cameron v. Campbell*, 141 Fed. 32, 72 C. C. A. 520.

³ The requirement that said notice shall contain "a statement of the labor performed and materials furnished" is substantially complied with by a notice stating that the lien is claimed for "work, labor and services performed upon said building, and sash, doors, blinds, moulding, and other building materials sold and delivered to be used, in and upon said building and premises, under said agreement with said principal contractors for the agreed

price of," etc. *Hausmann Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587, 67 N. W. 1136; doctrine of variance in pleading does not apply; *Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 470, 88 Pac. 497.

⁴ *Illinois*.—*Hurtt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 655; *Keefe v. Minehan*, 93 Ill. App. 586; *Davis v. Rittenhouse*, 92 Ill. App. 341.

Washington.—*Young v. Borzone*, 26 Wash. 4, 55 Pac. 135, 421.

Wisconsin.—*Laev Lumber Co. v. Auer*, 123 Wis. 178, 101 N. W. 425; *Dusick v. Meiselbach*, 118 Wis. 240, 95 N. W. 144. It is liberally construed, *McNabb, etc., Mfg. Co. v. Paterson Bldg. Co.* (N. J. Eq.) 63 Atl. 709.

⁵ *Gilman v. Gard*, 29 Ind. 291; *Simonds v. Buford*, 18 Ind. 176; *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118; *Towner v. Remick*, 19 Mo. App. 205. A notice of claim for lien by material men to the owner, that "we—have furnished to your contractor—certain material in the erection of your

quirement that the notice should contain a just and true account, does not mean that it should be itemized.⁶ The fact that the notice is addressed to other persons will not avoid it, if the right person gets it, and it is sufficient to put him upon guard as to the rights of the parties.⁷ Superfluous statements, unless misleading, will not affect the validity of the notice.⁸ If the work is done under different contracts, though on the same plant, one notice will be sufficient.⁹ However if there are several contracts, all included in one, the notice should be so worded that what is due on each can be determined.¹⁰ The statute need not be referred to by name or section.¹¹ The statute usually requires the notice to be in writing, and where this is the case a verbal notice will not suffice.¹² Where the statute does not require the notice to be in writing, a verbal notice is sufficient only if it is of such a character that the owner by the exercise of reasonable judgment will know that

building, cor. A. Ave. & C. St. in Shelby County, and bill of material—leaves a balance of \$314.99,” and “rely upon our lien on said building for payment of same,” is sufficient. *Bassett v. Bertorelli*, 92 Tenn. 548, 22 S. W. 423; *Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242; *Vitelli v. May*, 120 App. Div. (N. Y.) 448, 104 N. Y. Supp. 1082.

⁶ *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118.

⁷ *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942; *Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47. Under code, art. 63, § 11, of Maryland, providing that one furnishing materials under a contract with a builder should be entitled to a lien, if giving within a specified time a notice “in writing to the owner, of his intention to claim a

lien,” a written notice by a material man to the owner of the building, notifying the owner of his intention to claim a lien, is sufficient, though also addressed to other persons. *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

⁸ *Wambold v. Gehring*, 109 Wis. 122, 85 N. W. 117.

⁹ *Hooven, etc., Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. 229; see § 75, note 15.

¹⁰ *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665; *Garner v. Van Patten*, 20 Utah 342, 58 Pac. 684.

¹¹ *Hausmann Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587, 67 N. W. 1136.

¹² *Eastman v. Newman*, 59 N. H. 581; *Seibs v. Englehardt*, 78 Ala. 508; *Jeure v. Perkins*, 29 Iowa 262; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. 1112.

a claim is asserted.¹³ Under the New Jersey laws the notice must show that there was a demand made upon the contractor, and refused by him.¹⁴ The notice ought to be so certain as to the parties to be bound by it, that they will know that there is a claim asserted against them, and who asserts it.¹⁵ If a "detailed statement,"¹⁶ or the "amount due over and above all payments and offsets"¹⁷ or "the nature and kind of materials and amount claimed,"¹⁸ or "the amount due and demanded,"¹⁹ or "a sworn statement" is required, by statute, the lien will be

¹³ Quaaack v. Schmid, 131 Ind. 185, 30 N. E. 514.

¹⁴ Beckhard v. Rudolph, 68 N. J. Eq. 315, 59 Atl. 253; Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186; see § 75, note 11. Where a material man presented his bill to the contractor, stating that a notice was to be presented to the owner, and, though there was some talk about the examination of vouchers, there was no claim that the bill was incorrect or that the contractor offered to pay it, there was sufficient evidence of a demand on the contractor to support a notice to the owner. Evans v. Lower, 67 N. J. Eq. 232, 58 Atl. 294; Breneman v. Beaumont Lumber Co., 12 Tex. Civ. App. 517, 34 S. W. 198; Beckhard v. Rudolph, 68 N. J. Eq. 740, 63 Atl. 705.

¹⁵ Trammell v. Hudmon, 86 Atl. 472, 6 So. 4. A notice addressed to the "St. Mary's Female Orphan Asylum," and handed to a sister of charity who opened the door of the building, held not sufficient to establish a mechanics' lien against "The Sisters of Charity of St. Joseph." Kenly v. Sis-

ters of Charity of St. Joseph, 63 Md. 306; Putnam v. Ross, 55 Mo. 116, also 46 Mo. 337; Bambrick v. Webster Groves Presbyterian Church Assn., 53 Mo. App. 225; Downey v. Higgs, 41 Mo. App. 215. The fact that a notice served on an officer of a corporation, described the debtor as "B. & P.," instead of the "B. & P. Pipe Co.," is valid where otherwise correct. Fruin-Bambrick Const. Co. v. Jones, 60 Mo. App. 1. Where partners do the work it is not necessary that the claim state the parties are partners if the claim otherwise shows it. Duckwall v. Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; McNab, etc., Mfg. Co. v. Paterson Bldg. Co., (N. J. L.) 67 Atl. 103.

¹⁶ Green v. Robinson, 110 Ala. 503, 20 So. 65; Taylor v. Dall Lead & Zinc Co., 131 Wis. 348, 111 N. W. 490.

¹⁷ Davis v. Livingston, 29 Cal. 283.

¹⁸ Thomas v. Barber, 10 Md. 380.

¹⁹ Reeve v. Elmendorf, 38 N. J. L. 125. Under New Jersey law it was held void if the notice stated more than was really

void if the notice lacks in these respects.²⁰ The statute, however, need not be followed word for word.²¹ Neither will it be void for clerical or immaterial errors.²² Where the required statements are set out in the notice the question whether the claim is false or true, is one of proof on foreclosure.²³

§ 77. Notice to owner—Description of property—Service.—

As a matter of course, in seeking to fasten a lien upon certain property, such property must be described, but a technical description is not required; all that is necessary is that it be described with such certainty,¹ that the owner may know what property is meant, and advise him of the lien claim thereon.² The general rule is that the property should be sufficiently described to identify it.³ The notice must show for whose bene-

due. *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21; but not if he claims less; *Donnelly v. Johnes*, 58 N. J. Eq. 442, 44 Atl. 180; *Miller v. Calumet Lumber, etc., Co.*, 121 Ill. App. 56; *Tenth Nat. Bank v. Smith Const. Co.*, 218 Pa. 584, 67 Atl. 874; *McNab, &c., Mfg. Co. v. Paterson Bldg. Co.* (N. J. Eq.), 63 Atl. 709.

²⁰ *Bender v. Stettinius*, 10 Ohio Dec. (Re) 186; 19 Wkly. L. Bull. 163. In Ohio the contractor can waive the affidavit. *Kennett v. Rebholz*, 6 Ohio Dec. (Re.) 824, 8 Am. L. Rec. 354, 4 Wkly. L. Bull. 959.

²¹ *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

²² *Linck v. Johnson*; 66 Pac. 674, 134 Cal. 19 (without opinion); *Botto v. Ringwald*, 60 Ill. App. 415; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Laswell v. Presbyterian Church*, 46 Mo. 279.

²³ *Whittier v. Blakely*, 13 Ore. 546, 11 Pac. 305. A stop notice which declares that certain materials were furnished to the contractor "for and in the erection" of a building, sufficiently shows that the materials were actually used in the building. *Beckhard v. Rudolph*, 68 N. J. Eq. 740, 63 Atl. 705.

¹ *California*.—*Hotaling v. Cronise*, 2 Cal. 60.

Pennsylvania.—*Maddocks v. McGann*, 4 Lack. J. (Pa.) 34, 16 York 184, 12 Dist. (Pa.) 701; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301; *Springer v. Keyser*, 6 Whart. (Pa.) 186.

Indiana.—*Stephens v. Duffy*, (Ind. App.), 83 N. E. 268; see Dec. & Am. Dig. tit. mechanics' liens, §§ 122-126.

² *Henry v. Plitt*, 84 Mo. 237.

³ *Bambrick v. King*, 59 Mo. App. 284. Notice of a mechanic's lien, by a subcontractor to the owner of a building, must be in

fit it is given and therefore as a rule the statutes require it to be signed by the lienor, and if not so signed it is generally held invalid.⁴ If no signature of lienor is required by statute, then it need not be signed. Even where it is required to be signed, it may be signed by the authorized agent of the lienor unless expressly forbidden by statute.⁵ The statute usually indicates how the notice must be served or given, and if it directs that it must be given personally,⁶ it would not be valid if otherwise given unless it is shown that the owner actually received it.⁷ Unless specifically allowed by statute, service of notice through the mails,⁸ or upon an agent,⁹ or trustee,¹⁰ is invalid.¹¹ For much stronger reasons the owner cannot be bound by a notice given to an unauthorized person.¹² It is not necessary that the notice be served by an officer;¹³ the material fact

writing; and a notice, although written, but with no name signed to it, and not stating from whom it came or who held the claim, is not sufficient, nor can the omissions be supplied by evidence of verbal information to the owner of the facts. *Schulenberg v. Bascom*, 38 Mo. 188; member of firm; *Dwyer Brick Works v. Flanagan*, 87 Mo. App. 340; may be corrected; *Stephens v. Duffy* (Ind. App.), 81 N. E. 1154, rehearing denied, 83 N. E. 268.

⁴ *Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899; *Wetenkamp v. Billigh*, 27 Ill. App. 585.

⁵ *Treusch v. Shryock*, 51 Md. 162; *Williams v. Bradford* (N. J. Eq.), 21 Atl. 331.

⁶ *Illinois*.—*Carney v. Tully*, 74 Ill. 375; *Peck v. Hinds*, 68 Ill. App. 319.

Missouri.—*L. H. Rumsey Mfg. Co. v. Baker*, 35 Mo. App. 217; *Ryan v. Kelly*, 9 Mo. App. 396.

Wisconsin.—*Dusick v. Meiselbach*, 118 Wis. 240, 95 N. W. 144; *Bank v. Maples*, 119 La. 41, 43 So. 905.

⁷ *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575; *Meyer v. Christian*, 64 Mo. App. 203, 2 Mo. App. Rep'r. 1060.

⁸ *Carney v. Tully*, 74 Ill. 375; *Peck v. Hinds*, 68 Ill. App. 319; *Blanchard v. Ely*, 179 Mass. 586, 61 N. E. 218.

⁹ *Sanitary Dist. of Chicago v. Phoenix Powder Mfg. Co.*, 79 Ill. App. 36; sufficient authority; *Greilick Co. v. Rogers*, 144 Mich. 313, 107 N. W. 885, 13 Det. Leg. N. 161.

¹⁰ *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118.

¹¹ *Wickham v. Monroe*, 89 Iowa 666, 57 N. W. 434; *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118.

¹² *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

¹³ *McGann v. Sloan*, 74 Conn.

being that the party intended received the notice.¹⁴ As a general rule, service may be made by copy.¹⁵ Where the right to the lien depends upon the giving of the notice, as a matter of course, the lien fails if no notice is given,¹⁶ and equity will not aid the claimant.¹⁷ As a general rule, the notice operates upon the conditions existing at the time it is given, taking into consideration the statutes relating thereto.¹⁸ It is to be noted in this connection that the statutes recognize no such thing as constructive notice.¹⁹ Where the notice is properly given, the owner is bound to retain whatever is in his hands, and where given by a subcontractor, if the contractor has no defense and no others are entitled to share therein, the effect is to work an appropriation of the amount to the benefit of the subcontractor, and must be paid to him.²⁰ Where the constitution gives a lien, a lien may exist though the statute be not fully complied with.²¹

726, 52 Atl. 405; Carey-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Bassett v. Bertorelli, 92 Tenn. 548, 22 S. W. 423.

¹⁴ Fehling v. Goings (N. J. Eq.), 58 Atl. 642.

¹⁵ Kelly v. Syracuse, 10 Misc. (N. Y.) 306, 31 N. Y. Supp. 283.

¹⁶ Torrance v. Bowton, 96 Ill. App. 475.

¹⁷ Frolich v. Beecher, 139 Mich. 278, 102 N. W. 736, 11 Det. Leg. N. 835.

¹⁸ Robinson v. State Ins. Co., 55 Iowa 489, 8 N. W. 314; Taylor v. Reed, 68 N. J. L. 178, 52 Atl. 579; Hayden Saddlery Hardware Co. v. Slade, 3 Ohio Cir. Ct. 67, 2 Ohio Cir. Dec. 38; Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744.

¹⁹ Merritt v. Hopkins, 96 Iowa

652; Lonnsbury v. Iowa, etc., R. Co., 49 Iowa 255.

²⁰ California. — San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255.

Illinois.—Brown v. Lowell, 79 Ill. 484.

New Jersey. — Donnely v. Johnes, 58 N. J. Eq. 442, 44 Atl. 180.

New York.—Reeves v. Seltz, 47 App. Div. (N. Y.) 267, 62 N. Y. Supp. 101; Monteith v. Evans, 5 N. Y. Super. Ct. 65.

Ohio.—Busse v. Voss, 9 Ohio Dec. 441, 13 Wkly. L. Bull. 542; Cincinnati v. McNeely, 7 Ohio Dec. 216, 1 Wkly. L. Bull. 303.

Texas.—Loonie v. Frank, 51 Tex. 406.

²¹ Delauney v. Butler, Tex. Civ. App. 55 S. W. 752; see § 79, note 7.

§ 78. **Service of notice—Ohio statute.**—Section 3204 of the Revised Statutes of Ohio provides that any notice, affidavit, or copy required to be served under the provisions of this chapter may also be served by the sheriff of the county within which the person, board or officer sought to be served is resident, in manner and form, and for which he shall be entitled to the same fees as provided by law for service of summons in a civil action for money only, and if the owner of property sought to be subjected to a lien resides without the state, or is beyond the reach of process, notice may be given by publication as in civil actions.²²

§ 79. **Filing contract—Notice.**—The necessity of filing the contract as a condition to the lien right, has been previously considered.¹ Where the statute requires the contract to be filed,² or recorded,³ this provision must be complied with. The purpose of the requirement is to give all concerned full notice of the claimant's rights.⁴ If no special book is designated in which it should be filed, or recorded, a book of deeds has been held sufficient.⁵ It will be more properly filed however in a lien record of some kind, unless the statute otherwise provides. A copy can not be used for this purpose.⁶ Where the constitution gives a lien, and the statute requires the contract to be filed, the neglect to file in such a case will not bar the right of the claimant, the constitutional provision

²² 99 Ohio Laws 503.

¹ See § 56. See Dec. & Am. Dig. tit. Mechanics' Liens, § 127.

² Buck v. Brian, 2 How. (Miss.) 874.

³ Blinn Lumber Co. v. Walker, 129 Cal. 62, 61 Pac. 664; Foster v. Stone's heirs, 20 Pick. (Mass.) 542; Calvert v. McKinney, 2 Posey (Tex.) Unrep. Cas. 345; Iaege v. Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

⁴ Buck v. Brian, 2 How. (Miss.), 874; superior to trust deed; Claes v. Dallas Homestead & Loan Assn., 83 Tex. 50, 18 S. W. 421; Cameron v. Marshall, 65 Tex. 7; Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 Pac. 262.

⁵ Glading v. Frick, 88 Pa. St. 460; Bosley v. Pease, 86 Tex. 292, 22 S. W. 516.

⁶ San Francisco Lumber Co. v. O'Neill, 120 Cal. 455, 52 Pac. 728.

being superior to the statute.⁷ Especially will this be true where the contract stipulates that the builder shall have a lien.⁸ But this has been held to apply only to the principal contractor and not between subcontractors.⁹ If the contractor or other person, whose duty it is to file a contract, is prevented from doing so by the wrongful act of the owner, then the owner will be liable as though the contract were filed.¹⁰ However, the fact that the contract is in possession of the owner, will not excuse the claimant from filing it as provided by statute.¹¹ Due diligence is required of the claimant in this respect; if he has not the original, he should do the next best thing and file a copy,¹² or, in extremity, a bill of the items.¹³

⁷ **California.**—West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533.

Texas.—D. June & Co. v. Doke, 35 Tex. Civ. App. 240, 80 S. W. 402; Kahler v. Carruthers (Tex. Civ. App.), 45 S. W. 160; Strang v. Pray, 89 Tex. 525, 34 S. W. 666, 35 S. W. 1054; Warner Elevator Mfg. Co. v. Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499; Phelps & Bigelow Windmill Co. v. Parker (Tex.), 30 S. W. 365. Under Const. Art. 16, 37, providing that mechanics and material men shall have a lien on the building made thereon or material furnished therefor, and that the legislature shall provide for the speedy and efficient enforcement of said lien, as against the owner an original contractor who performs labor and furnishes material is entitled to a lien, though he does not record his contract or account as provided by Rev. St. 1895, Art. 3295. Farmers' and Mechanics' Nat. Bank v. Taylor, 91 Tex. 78, 40 S. W. 876; see also,

Whiteselle v. Texas Loan Agency (Tex.), 27 S. W. 309; Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278, 788; Lyon v. Elser, 72 Tex. 304, 12 S. W. 177.

⁸ D. June & Co. v. Doke, 35 Tex. Civ. App. 240, 80 S. W. 402; Farrell v. Palestine Loan Ass'n (Tex.), 30 S. W. 914.

⁹ Cameron v. Terrell (Tex.), 36 S. W. 142.

¹⁰ McCormick v. Lawton, 3 Neb. 449; Strang v. Pray, 89 Tex. 525, 34 S. W. 666, 35 S. W. 1054; Warner Elevator Mfg. Co. v. Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353; Warner Elevator Mfg. Co. v. Houston (Tex. Civ. App.), 28 S. W. 405.

¹¹ Warner Elevator Mfg. Co. v. Houston (Tex. Civ. App.), 28 S. W. 405.

¹² Parks v. Tipple (Tex.), 34 S. W. 676.

¹³ **What is a written contract.**—Where a contract was contained in an offer in writing and an acceptance by telegram, one claiming a mechanic's lien under it

§ 80. **Filing claim or statement.**—The giving of notice considered in the previous sections is usually required in cases where a person not under direct contract with the owner seeks either to hold the property responsible for a lien that might thereafter be perfected or to fasten a personal responsibility on the owner. As a general rule such notice does not of itself fasten a lien on the property of the owner, and when either a contractor or subcontractor seeks to hold the property responsible for his claim, and fasten a lien thereon, he must file a claim, statement or affidavit, as it is called in various statutes and decisions, in the manner and place designated by the statute. The object and purpose of this requirement is, to compel the claimant, within a reasonable time after the work is completed, to elect whether or not he will attempt to enforce a lien on the premises, and if he does wish to maintain a lien then notice in this manner will be given to all parties dealing with the owner, such as purchasers, or incumbrancers of the property, of the fact that there is a lien claim thereon. As a general rule it may be stated that the mere furnishing of labor or materials for certain property or a decree of court in foreclosure will not fasten a mechanic's lien on property.¹ The only way in which a lien can be fastened on the property is by complying with the statute, and when the statute so requires, by properly filing a statement or claim.² This fact, therefore,

who had possession of the telegram only, while the owner of the building had the offer, did not "have" a written contract, within the meaning of Rev. Civ. St. Act. 3165, providing that, if the lien claimant "have" no written contract, it will be sufficient to file an itemized account of the claim. *Warner Elevator Mfg. Co. v. Maverick*, 88 Tex. 489, 30 S. W. 437; *Riter v. Houston Oil Refining & Mfg. Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758.

¹ *Wilson v. Hopkins*, 51 Ind. 231; *Carson v. White*, 6 Gill (Md.) 17; *Cameron v. Terrell* (Tex. Civ. App.), 36 S. W. 142; *Mayes v. Ruffners*, 8 W. Va. 384; see Dec. & Am. Dig. tit. Mechanics' Liens, § 128.

² *California*.—*Walker v. Hauss-Hijo*, 1 Cal. 183.

Illinois.—*Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39.

Indiana.—*Pifer v. Ward*, 8 Blackf. (Ind.) 252; *Robinson v. Marney*, 5 Blackf. (Ind.) 329.

becomes a jurisdictional one in the foreclosure of the lien,³ and no action will lie until a compliance with the statute in this respect is shown.⁴ A court of equity cannot give relief, where there is a failure in this respect, even though the equities of the parties are otherwise strong.⁵ Under some statutes it is sufficient as to the owner, if the statement is filed with the petition to foreclose.⁶ And under others, it is held that when only the owner is affected, no statement at all need be filed.⁷ The same strictness is not required between the original parties as in cases where the rights of third persons intervene.⁸ Where the rights of third parties are involved neither the fact that the work is stopped by default of the owner,⁹ nor the appointment of a receiver for the property, will excuse a compliance with the statute.¹⁰ Some courts demand a strict compliance with the statute,¹¹ while others are satisfied with

Iowa.—*Breneman v. Harvey*, 70 Iowa 479, 30 N. W. 846.

Michigan.—*Sisson v. Holcomb*, 58 Mich. 634, 26 N. W. 155.

Nebraska.—*Noll v. Kenneally*, 37 Neb. 879, 56 N. W. 722.

New York.—*Tommasi v. Archibald*, 114 App. Div. (N. Y.) 838, 100 N. Y. Supp. 367.

Pennsylvania.—*Armstrong v. Hallowell*, 35 Pa. St. 485.

Virginia.—*Boston v. Chesapeake, &c., R. Co.*, 76 Va. 180.

³ *Davis v. MacDonough*, 109 Cal. 547, 42 Pac. 450; *Sanderson v. Fleming*, 37 Mo. App. 595; *Tidball v. Holyoke*, 70 Neb. 726, 97 N. W. 1019; *Gilmer v. Wells*, 17 Tex. Civ. App. 436, 43 S. W. 1058.

⁴ **Illinois.**—*Christian v. Allee*, 104 Ill. App. 177; *Whitlow v. Champin*, 52 Ill. App. 644; *Naughten v. Palmer*, 46 Ill. App. 574.

Minnesota.—*Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 12 Am. St. 663, 1 L. R. A. 777.

Nebraska.—*Cummins v. Vandeventer*, 52 Neb. 478, 72 N. W. 955.

Pennsylvania.—*Lewis v. Morgan*, 11 Serg. & R. (Pa.) 234.

⁵ *Withrow Lumber Co. v. Glasgow Inv. Co.*, 106 Fed. 363, 45 C. C. A. 321.

⁶ *Anderson v. Seamans*, 49 Ark. 475, 5 S. W. 799.

⁷ *Berndt v. Armknecht*, 50 Ill. App. 467; *Moore v. Parrish*, 50 Ill. App. 233; *Maxwell v. Koeritz*, 35 Ill. App. 300. *Contra Christian v. Allee*, 104 Ill. App. 177.

⁸ *Hopes v. Bale*, 105 Iowa 648, 75 N. W. 495; *Evans v. Tripp*, 35 Iowa 371; *Kidd v. Wilson*, 23 Iowa 464; *Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242.

⁹ *Merchants', etc., Sav. Bank v. Dashiell*, 25 Gratt. (Va.) 616.

¹⁰ *Withrow Lumber Co. v. Glasgow Inv. Co.*, 101 Fed. 863, 42 C. C. A. 61.

¹¹ *Long v. Pocahontas Coal Co.*, 117 Ala. 587, 23 So. 526.

a substantial compliance.¹² Unless the statute makes a reservation to that effect the lien abates with the death of the owner and the mechanic stands in the same position as other debtors.¹³ Generally where the law has been changed, the statute in force at the time the statement is filed controls.¹⁴ Under some statutes where a subcontractor properly files his statement, others in the same class will be allowed to participate and share pro rata.¹⁵

§ 81. **Lien of principal contractor—How acquired—Ohio statute.**—Section 3185 of the Ohio statute provides: Such person, in order to obtain such lien, shall within four months from the time of completion of such labor, or furnishing such machinery, material or fuel, file with the recorder of the county where the labor was performed, or the machinery or the material or fuel furnished, an affidavit containing an itemized statement of the value and amount of such labor, machinery, material or fuel, and a description of any promissory note or notes given for such labor, machinery, material or fuel, or any part thereof, with all credits or offsets therein, a copy of the contract, if it is in writing, a statement of the amount and times of payments to be made thereunder and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, furnace, manufactory, or other building or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed, or on which such tile for drainage purposes may have been used; and the same shall be recorded in a separate book to be kept therefor, and shall operate as lien from the date of the first item of the labor performed, or the machinery, material or

¹² *Ficklin v. McCarty*, 54 Tex. 370.

¹³ *Dobbs v. Enearl*, 4 Wis. 451 (471).

¹⁴ *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64. In other cases, it is the law when the contract is

made. *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108, 75 Pac. 150.

¹⁵ *Kennett v. Rebholz*, 6 Ohio Dec. (Re.) 824, 4 Wkly. L. Bull. 959, 8 Am. L. Rec. 354.

fuel furnished, upon or toward the property, designated in section 3184, and the interest of the owner in the lot, or land upon which the same may stand, or to which it may be removed, for six years from and after the date and of the filing of such attested statement. If any action be brought to enforce such lien within that time, the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter. Such person so filing the affidavit herein provided, shall within thirty days thereafter, notify the owner of the property, his agent or attorney that he claims such lien, and if he fail to do so, the lien so secured shall be null and void.¹⁶

Section 3187 relates to the mode of obtaining the lien for labor on and materials for roads, ditches, etc., promissory notes, record, extent and duration of such lien. It provides that in order to obtain such lien, such person shall, within four months from the time of performing the labor or furnishing the material or machinery, file with the recorder of the county where such labor was performed or material or machinery furnished, an affidavit containing an itemized statement of the amount and value thereof, and a description of any promissory note or notes given for the same, or any part thereof, an estimate of the amount chargeable to each foot front along the line of the improvement, and if the contract is made with several owners, a description of the land of each, with the number of feet belonging to each abutting on such line, a copy of the contract, if it is in writing, and if not in writing, a statement of the amount and time of payments to be made thereunder, which shall be recorded in a separate book to be provided therefor, and shall operate as a lien on the interest of such delinquent in the abutting land from the day of the first item of labor done or material furnished, for one year from and

after the filing of such statement, and if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated.¹⁷

1. *Who can file.*

"Such person" referred to in the above section, means the same as "any person" referred to in Section 3184. The performance of the things set forth in the statute are essential in order to create a lien on the property. It bears more of the characteristics of a remedial statute, than of a substantive one, and while it is necessary that the requirements of the statute be substantially followed, yet the construction placed thereon will be of a liberal character rather than otherwise. While liberality should be exercised in construing the rights of a mechanic's lien where it has once attached, it must be strictly followed in securing the lien.¹ If "such person" should die, his administrator or executor may file the claim. Section 3185, relates only to the lien on the property, by a principal contractor. It will not affect the rights of a subcontractor, or the remedy of a principal contractor were he to bring an action on the debt.

2. *When to be filed.*

The statute requires the lien to be filed within four months from the time of the completion of such labor or the furnishing of machinery, material or fuel. It must be after and not before the work is done. In making such calculation, calendar and not lunar months are meant.² And in computing the time, the first day is excluded, and the last included, and if the last

¹⁷ Act Mar. 5, 1887, 84 Ohio C. C. 80, affirmed (unrep.) 74 Laws 46, 47, Rev. St. § 1880, 74 Ohio St. 497, 78 N. E. 1130.
Ohio Laws 168, § 4.

² *McMurchey v. Robinson*, 10

¹ *Lapham v. Ransford*, 27 Ohio Ohio 496.

falls on Sunday, it is excluded.³ The completion of the labor, means that the job or the part which the contractor agreed to do, has been performed. So far as the principal contractor is concerned, material or machinery would be considered as furnished when he places the same in the building, to the use or purpose to which it was contemplated by the contract between himself and the owner. Some difficulty is experienced sometimes in determining the question of the completion of the labor, or the furnishing of the material where the same is not all done or furnished at one time. Then the question would be, whether the contract was entire or whether the work was done and materials furnished on separate and independent contracts. Our Supreme Court has held that where the contract was with a railroad company to erect, build and complete, furnishing all materials, for bridges remaining to be built upon the line of its road between two points specified, therein it was an entire contract.⁴ So in another case, where the builder came to a material man with a memorandum of materials, then needed, and desired prices on them, adding that he was going to build several houses, and that he wanted the material man to furnish the lumber, the contract was held to be entire, and the lien in time, if dating from the last delivery.⁵ But two distinct accounts cannot be tacked together to make a continuous account.⁶ In such cases, each must be secured by a lien, dating from the last item of each account.⁷ Where the material is furnished under what may be considered a running account, if under a contract express or implied, that such material is to be furnished for certain improvements, then it is in time, if dated from the last item. It is not sufficient, however, where no other contract is shown except such as is implied from the

³ *Bushong v. Graham*, 4 Ohio C. C. 138, 2 Ohio Cir. Dec. 464.

⁴ *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 67.

⁵ *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

⁶ *King v. Cleveland Ship Bldg. Co.*, 50 Ohio St. 320 34 N. E. 436.

⁷ *Hazard Powder Co. v. Loomis*, 13 Ohio Dec. (Re.) 333, 2 Disney (Ohio) 544; *Gibbons v. Brewer*, 37 Ohio L. Bull 90, 1 O. S. U. 554.

running of mutual accounts between the parties for many years.⁸ The time of filing cannot be extended by attaching one lien to another, or by the addition of an item after the work has been completed.⁹ If additional work was an essential part of the contract, and has been omitted through inadvertence or neglect, and no one is prejudicially affected thereby, the lien may be taken within the time fixed by statute dating from such additional work. If the parties agree that the work is completed, the period will date from that time. The claim must be filed after and not before the completion of the building, or furnishing of material. Under a contract wherein it was provided that certain machinery was to be delivered, F. O. B. cars, at a designated place, it would be considered as furnished within the meaning of the statute at the time it was so delivered on the cars.¹⁰ Where material is to be furnished for the acceptance of an engineer or superintendent, the time dates from such acceptance.¹¹ If the items are so far apart that it cannot be considered as one account the time will not commence with the first item.¹²

3. *Where to be filed.*

The lien must be filed with the Recorder of the County in which is located the structure or improvement, including the lot of land upon which it is situated. The fact that the labor was done in another county would make no difference.¹³ If work or labor is furnished upon property which includes land in two counties, in order to make it effective on the land in both counties, the lien must be filed in each county, otherwise,

⁸ Portsmouth Iron Co. v. Murray, 38 Ohio St. 323.

⁹ Hazard Powder Co. v. Loomis, 13 Ohio Dec. (Re.) 333, 2 Disney (Ohio) 544.

¹⁰ King v. Cleveland Ship Bldg. Co., 50 Ohio St. 320, 34 N. E. 436.

¹¹ Franklin Bank v. Cincinnati,

10 Ohio Dec. 545, 8 Ohio N. P. 517.

¹² Meridian Nat. Bank v. McConica, 4 Ohio Cir. Dec. 106, 8 Ohio C. C. 442.

¹³ Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 9 Ohio Fed. Dec. 2, 66 Fed. 683.

only the land can be sold in satisfaction of the lien which lies in the county where the lien is filed, for the lien cannot operate beyond the limits of the county in which it is filed.¹⁴

5. *Affidavit.*

No particular form of the statement is required, so long as it contains the essentials provided for in the statute. In addition to the matters specifically stated in the statute, the claim should contain the names of the contractor and the owner of the property. These things would necessarily follow from the stating of the contract. An affidavit is defined to be a declaration under oath, reduced to writing and affirmed or sworn to by affiant before some person who has authority to administer oaths.¹⁶ And perhaps any form would be held sufficient which would show on its face that the essentials required by the statute, have been sworn to by the party claiming the lien.

6. *Verification of affidavit.*

This affidavit may be made by the person furnishing the labor himself, or where they claim it as a partnership, by a partner, or by an officer of a corporation, or by any duly authorized agent.¹⁷ It may be made by an assignee for the benefit of creditors,¹⁸ or by any one who knows the facts and has authority from the claimant. The affidavit should not be made on belief, but should be sworn to as a fact.¹⁹ If not so sworn to, it is a nullity. The fact, however, that the officer administering the oath failed to attach his seal, will not vitiate the lien, as generally considered, an attested account, and a sworn account, are synonymous terms.²⁰

¹⁴ *Marlatt v. Hascall*, 13 Ohio (Ohio) 430, 13 Ohio Dec. (Re.) Dec. 364.

¹⁶ *Cyc.* Vol. 2, page 4.

¹⁷ *St. Clair Bldg. Assn. v. Hayes*, 2 Ohio C. C. 225, 1 Ohio Cir. Dec. 456. See § 119, *Verification of Claim*.

¹⁸ *Williams v. Webb*, 2 Disney

¹⁹ *Bender v. Stettinius*, 19

Ohio L. Bull. 163, 10 Ohio Dec. (Re.) 186.

²⁰ *Kennett v. Rebholz*, 4 Ohio L. Bull. 959, 8 Am. L. Rec. 354, 6 Dec. (Re.) 824, 7 Dec. (Re.) 685.

7. *Itemized statement.*

There are four essentials that the affidavit must contain, first of which is "an itemized statement of the value and amount of such labor, etc." A standard authority, Swan's Treatise, § 616, states this to mean that the account should be made out in the usual form of rendering an account, and when a mechanic undertakes and completes a building as an entire job for a gross sum, it is not necessary to make a detailed statement of the material and labor, but that the entire job may be set down as a single item.²¹ As a general rule, it may be said that the items composing the labor or the material, when they are not furnished under a job contract, should be set out in detail, giving the date when furnished, and the price of the article or labor furnished on that date in ordinary bookkeeping style.

In *Davis v. Hines*, 6 Ohio St. 473, the account was as follows:

"May 24, 1849.

"Mr. Stephen Davis, debtor to Jacob Hines, doing carpenter work, etc., at house in Mount Washington:

"Carpenter work	\$510.00
"To painting and fitting sash @ 4½.....	17.74
	\$527.74
"Agreed on by us.....	\$527.74

(Signed.) "Jacob Hines.
"Stephen Davis."

This was held to be sufficient.

In another Ohio case (*Thomas v. Huesman*, 10 Ohio St. 152), the account was as follows:

"L. Huesman to J. Harvey Thomas, Dr. 1854—September 22:
"To carpenter work on house as measured.....\$951.05"

This was held sufficient.

²¹ See § 116, *Itemized Account*.

In both of these cases, the work was done under a job contract. In the latter case a mistake in claiming \$60.00 more than was actually due, did not affect the validity of the statement. As a general rule, an inaccuracy in the account, which was not intended to work a fraud, and which did not actually do so, will not affect the validity of the lien. The same thing is true, if non-lienable items are mixed up with the lienable ones, provided they can be separated. If it is impossible to separate them, the entire lien is void. Thus, where steel is furnished, it is void because itemized as merchandise.²² If any payments have been made, or there are any proper credits on the account, these must be given.

8. *Promissory note.*

The second requirement of the affidavit is, that it contain a description of "any promissory note given for labor," etc., "with all credits and off-sets thereon." This provision was placed in the statute, no doubt, from the fact that some of our courts²³ had held that the taking of a promissory note was a waiver of the lien, especially as to the amount evidenced by the note. Whether or not the court would hold that an omission to give a copy of the note, as now required, would merely affect the lien pro tanto as to such an amount as is covered by the note or destroy the entire lien, has not, to the knowledge of the writer, been decided. It seems, however, that there may be other reasons considered by the legislature, and that if such a statement were omitted, the validity of the entire lien will be questionable. The better holding now is, that the taking of a promissory note, unless there be an express

²² *Great Southern Fireproof Hotel Co. v. Jones*, 13 Ohio Fed. Dec. 727, 116 Fed. 793; 54 C. C. A. 165, affirmed, *Great Southern Fireproof Hotel Co. v. Jones*, 14 Ohio

Fed. Dec. 337, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. ed. 778.

²³ *Standard Oil Co. v. Sowden*, 55 Ohio St. 332, 45 N. E. 320; *Crooks v. Finney*, 39 Ohio St. 57; *Merrick v. Boury*, 4 Ohio St. 60.

agreement that the note is received in payment, is not a waiver,²⁴ though given for the amount due.²⁵

9. *Contract—Copy of.*

While the above statute does not in words say that it must be stated in the affidavit that the work was furnished "under a contract," yet as the contract is an essential of the lien, the statement will be void, if it did not contain an averment of that kind.²⁶ The statute is specific as to what shall be stated, if the contract is in writing, and must be strictly followed. The provision in the statute, that "a statement of the amount and times, and payments to be made thereunder," should be given in the affidavit, seems to be surplusage, for the copy of the contract itself, if it be in writing, ought to contain this fact, and it would be sufficient compliance with this statute if the copy of the contract showed such fact without an additional averment. But if the contract, which is in writing, does not show the time and amount of payments to be made thereunder, then this averment should be in the statement. Where the contract is verbal, it seems it would be proper to set out the terms of the contract, and the times of payment, although this has been held not to be an essential.²⁷ If the claimant does not have and can not get possession of the written contract, then this fact should be stated, and the amount and times of payment given. A proposition which is in writing, and is accepted verbally, is not a contract in writing within the meaning of this statute. Before it would be a contract in writing it would need to have the signature of both parties attached.²⁸

²⁴ Bernsdorf v. Hardway, 6 Ohio Cir. Dec. 171, 2 Ohio Dec. 326, 7 Ohio C. C. 378.

²⁵ Kunkle v. Reeser, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

²⁶ Lapham v. Ransford, 27 Ohio C. C. 80; affirmed (unrep.)

Lapham v. Ransford, 74 Ohio St. 497, 78 N. E. 1130.

²⁷ Kunkle v. Reeser, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

²⁸ In re Cincinnati Brew. Co., 9 Ohio Dec. 519, 6 Ohio N. P. 472

10. *Description of land.*

The fourth essential is that this affidavit must contain a description of the land upon which the improvement is located. This is an essential, a failure to comply with which will nullify all attempts to secure a lien. The best and most accurate description should be inserted that can be readily obtained. That is preferred which is contained in the deed evidencing the title of the same. However, such a description is not absolutely essential, and it will be sufficient if it is of such a character that it will advise prospective purchasers and others, of the lien, and of the land upon which it is claimed.²⁹ The fact that there was an inadvertent misdescription, will not invalidate the lien on that part of the real estate which is properly described,³⁰ and the claimant may, if within the time, correct the same by filing another claim with a proper description. Where a debtor makes an assignment before the lien is filed, and the title of the property then becomes vested in the assignee, it is probable that less certainty of description will suffice.³¹ As a general rule, a description is sufficient which will enable any person fairly familiar with the land in the vicinity to identify the same, or which will be sufficient to enable the sheriff to levy an execution under a writ of that character.

11. *Date of lien.*

When the affidavit is properly made out and filed, it operates as a lien from the date of the first item of the labor performed, or machinery, etc., furnished upon, or toward the property. This language is to be used without limitation, qualification or reservation in favor of any person, and as the claimant cannot file his lien until after the work is completed, to hold otherwise would be to defeat in a large meas-

²⁹ *Kunkle v. Reeser*, 5 Ohio Cir. Dec. 564, 6 Ohio C. C. Dec. 422, 5 Ohio N. P. 401. See 516.

§§ 103-107.

³¹ *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

³⁰ *Pedretti v. Stichenoth*, 3

ure the objects of the statute.³² As between persons under a direct contract with the owner, there is no distinction between them.³³ If the work or labor is done under such circumstances as would constitute a running account, the lien will date from the first item. But if the labor or materials were so furnished that each might be considered as a separate contract, then the lien will date from the first item under each contract.³⁴ No written or other notice is required, on the part of the claimant, other than that which can be gathered from the appearance of the premises, during the time the work is performed, or the materials are furnished. Strangers must take notice at their peril, the same as where persons are in actual occupancy of the premises.³⁵ As a general rule it may be said that excavation of a foundation of a building is the commencement of the building, and this is notice to all persons, that there may be mechanics' liens on the premises. So, too, if stone or lumber, suitable for building purposes, is placed upon the ground, this will be notice, and as between the original parties it might be possible for the lien to date from the time when there was no visible means of knowing that a structure was to be erected on the premises, as where the materials are prepared in a shop some distance from the premises. This would be held good unless it prejudiced the rights of third persons. Even if the premises bore no visible evidence of the structure about to be put thereon, yet if parties had actual knowledge that a building was to be constructed, they would be bound by such knowledge. These conclusions apply to all persons claiming a lien prior to the mechanic. When there is a new contract, materials fur-

³² *Williams v. Miller*, 2 Ohio Dec. (Re.) 119, 1 West. L. Mo. See § 129.

³³ *Choteau v. Thompson*, 2 Ohio St. 114.

³⁴ *Choteau v. Thompson*, 2 Ohio St. 114; *Gibbons v. Brewer*,

37 Ohio L. Bull. 90; 1 O. S. U. 554; *Bernsdorf v. Hardaway*, 6 Ohio Cir. Dec. 171; *Franklin Bank v. Cincinnati*, 10 Ohio Dec. 543, 8 Ohio N. P. 517.

³⁵ *Thomas v. Heusman*, 10 Ohio St. 152.

nished after the new contract will date from that time.³⁶ In case of machinery delivered F. O. B. lien dates from such delivery.³⁷

12. *Duration of lien.*

When the claim is once properly filed, the lien continues in force during the period of six years from and after the date of its filing, and if an action is brought within that time, it will continue in force until the action is finally disposed of. The word "brought" means obtained, or gotten, and signifies the same as sued out. "Brought" and "commencement" are synonymous terms, and the action is deemed commenced at the date of the summons which is served upon the owner of the land or structure, upon which it is sought to foreclose the lien. The courts sustain this provision of the statute.³⁸ But in order to do so, the claimant must exercise a reasonable degree of diligence. If the suit should be dismissed for want of prosecution, then the lien claim would be lost, unless a new suit was commenced within the six-year period. During this time, when the suit is in court, the doctrine of *lis pendens* applies.³⁹

13. *Notice to owner.*

The statute requires that such person, that is, the person filing the lien, shall within thirty days, notify the owner that he has filed and claimed such lien. Failure to do so will nullify the lien. A previous clause in the Ohio Mechanics' Lien Law made the necessity of such notification dependent upon the fact of there being a dispute about the claim. The present statute makes it an absolute requirement, and this is no doubt wise, be-

³⁶ *St. Clair Bldg. Assn. v. Hayes*, 1 Ohio Cir. Dec. 456, 2 Ohio C. C. 225.

³⁷ *King v. Cleveland Ship Bldg. Co.*, 50 Ohio St. 320, 34 N. E. 436.

³⁸ *Ambrose v. Woodmansee*, 27 Ohio St. 147. See § 131.

³⁹ *Owen v. Murry*, 6 Ohio Dec. 223, 4 Ohio N. P. 151. Effect of dismissal of suit: *Markley v. Michael*, 8 Ohio Dec. (Re.) 269, 6 Ohio L. Bull. 832.

cause the legislature considers that the lien should not be fastened upon any one's property without his knowledge.

FORM OF NOTICE TO OWNER.

Springfield, O. 19...

C. D.—Dear Sir—

You are hereby notified that, pursuant to the provisions of the mechanic's lien laws of Ohio, I have filed with the recorder of County, Ohio, for record as required by law, my account and affidavit thereto against you, in order to obtain a lien therefor under and by virtue of the provisions of said act, on your certain lot of land in the City of Springfield, said County, at the corner of North and East Streets, and the structures thereon.

E. F.

14. *Form of affidavit for lien, for persons under direct contract.*

In conformity to the suggestions above made, the following may be taken as a general form of affidavit:

State of Ohio, Clark County, ss.

A. B. (or authorized agent or attorney for A. B.), being first duly sworn, says that the foregoing (or annexed) account marked exhibit "A," and made a part hereof, is a true and correct statement of the labor done and materials furnished to said C. D. (naming the person, firm or corporation for whom done), together with the amount and values thereof, and times of doing same, together with all credits and offsets thereon (or if no credits or offsets, so state). That there is now due and owing him the sum of \$....., which he claims with interest from the day of, A. D. 19... (The average date of account, or when the same became due.) That said work and labor (materials or machinery) was done (or furnished) the said C. D. to be used, and were used, in and about the construction (or repair, according to fact) of a certain dwelling-house (mention kind of structure upon which work was done) situate upon a certain tract or

lot of land in the County of, State of Ohio, and bounded and described as follows: (Here give accurate description of premises upon which the structure is located.) In accordance with the terms of a written (or verbal) contract of which the following is a true copy: (Here, if written, set out exact copy of contract; if verbal, set out the substance of such verbal contract under which work was done or materials furnished with all modifications, giving for what contracted, dates, amounts and times of payment.) That the said C. D. gave to said claimant for such labor (or material or machinery or for part thereof) his certain promissory note (or notes) dated, for \$., due, with per cent.; that the following credits appear on said notes (or give copies of notes with all indorsements, etc.). The said C. D. is the owner of said premises and the said A. B. claims a mechanic's lien on said structure and the lot of land on which it is situate, by virtue of the mechanic's lien law, and its amendments, from the first item of said account (or from the commencement of said work) on the day of, A. D. 19...

A. B.

Sworn to and subscribed before me and in my presence by the said A. B. this day of, A. D. 19...

.....

§ 82. Lien—How acquired—Principal and subcontractor—Indiana statute.—Section 8297^{1a} of the Indiana statutes provides: Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after performing such labor or furnishing such materials, or machinery, described in section 1, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giv-

^{1a} Burns' 1908, sect. 8297, re-enacted by Acts Ind. 1909, p. 296.

ing a substantial description of such lot or land on which the house, mill, manufactory, or other buildings, bridge, reservoir, system of waterworks or other structure may stand or be connected with, or to which it may be removed. Any description of the lot or land in a notice of a lien will be sufficient, if from such description or any reference therein, the lot or land can be identified.

Section 8298^{1b} provides that the recorder shall record the notice, when presented, in the miscellaneous record book, for which he shall receive twenty-five cents; and all liens so created shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery, and shall have priority over all liens suffered or created thereafter, except the liens of other mechanics and material men, as to which there shall be no priority.

1. *Who may acquire.*

When the statute gives the right to a lien, upon the performance of certain labor, or the furnishing of certain material, the claimant must perfect that lien by taking all the steps provided for by the statute in order to create a lien on the property. If this is not done,—no matter by whose fault,—there can be no lien.¹ Knowledge by the owner, that the mechanic is performing the labor, or a material man furnishing material, or the fact that the work is done under contract with the owner, will not be sufficient to do away with the statutory requirements in perfecting the lien.² The person who may perfect such lien is designated in the previous section, and is the person who has performed the kind of labor

^{1b} Burns' 1908, Sect. 8298, reenacted by Acts Ind. 1909, p. 296. § 4.

¹ Windfall Nat. Gas, &c., Co. v. Roe, (Ind. App.) 84 N. E. 996.

See §§ 71, 102.

² Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Caylor v. Thorn, 125 Ind. 201, 25 N. E. 217. See § 74.

or furnished the kind of materials therein designated. Each claimant, unless the contract be a joint one, must proceed separately to perfect his lien.³

2. *Claim due or not due.*

It is immaterial whether the claim is due or not due, but it is material that the work has been performed, or that the materials have been furnished prior to the time that the lien is sought to be perfected. The lien dates from the first item of the labor performed or materials furnished, when once properly filed, and the owner is responsible from that date, hence there is no necessity for the lien to be filed until after the performance of the work, or the furnishing of the material.

§ 83. **Lien—Filing—Duration—Indiana statute.**—The claim must be filed in the recorder's office of the county in which the land is located, upon which the structure has been erected, or where the work has been done, and it is deemed recorded from the time of filing with the recorder.⁴ A failure to properly record it will not defeat the lien,⁵ unless recorded in a book which is not properly used for that purpose, and third parties are misled by such fact.⁶

1. *When to be filed.*

The notice is to be filed any time within the sixty-day period after the labor has been performed, or the materials furnished. If the contract includes the entire structure, then the period

³ McGrew v. McCarty, 78 Ind. 496; Northwestern Loan Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130. See § 85.

⁴ Wilson v. Hopkins, 51 Ind. 231; Northwestern Loan &c., Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130. See § 86.

⁵ Adams v. Buhler, 131 Ind. 66, 30 N. E. 883; Adams v. Shaffer,

132 Ind. 331, 31 N. E. 1108; Leeper v. Myers, 10 Ind. App. 314, 37 N. E. 1070; Northwestern Loan &c., Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130.

⁶ Falkner v. Colshear, 39 Ind. 201; Wilson v. Hopkins, 51 Ind. 231; Adams v. Buhler, 131 Ind. 66, 30 N. E. 883; Adams v. Shaffer, 132 Ind. 331, 31 N. E. 1108.

will begin to run from the completion of the building.⁷ Where the mechanic performs only a part of the labor or materials in the construction, then the period begins to run from the last items furnished.⁸ Even though the completion of the work^{8a} or the delivery of the last of the materials^{8b} be delayed several weeks after the remainder of the contract was completed and the work tendered (but rejected) as a full compliance with the contract, a lien filed within sixty days after the final act was done will be in time, if it was done under the original contract and by way of complete performance thereof.^{8c} If materials are furnished, under one contract, for several buildings, it will begin to run on either building from the last item furnished.⁹ Where it is necessary to test machinery to determine whether the contract has been completed, or where a certificate of the architect is to be given to determine that fact, then these facts will determine the beginning of the period.¹⁰ If after the contract is supposed to be completed, it is found that additional work is required, before it can be considered completed, then the time at which the additional work is done, will be the date from which calculation is made.¹¹ If filed within the sixty-day limit, the fact that there is nothing owing to the contractor by reason of payments made to him, will not affect the right of a sub-

⁷ *Hamilton v. Naylor*, 72 Ind. 171; *Lawton v. Case*, 73 Ind. 60; *Thomas v. Kiblinger*, 77 Ind. 85; *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583. See §§ 86-97.

⁸ *Hamilton v. Naylor*, 72 Ind. 171; *Lawton v. Case*, 73 Ind. 60; *Thomas v. Kiblinger*, 77 Ind. 85; *Stephenson v. Ballard*, 82 Ind. 87; *Patton v. Matter*, 21 Ind. App. 277, 52 N. E. 173.

^{8a} *Whitcomb v. Roll*, 40 Ind. App. 119; 81 N. E. 106.

^{8b} *Siegmund v. Kellogg*, 38 Ind.

App. 95, 77 N. E. 1096; *Home Brewing Co. v. Johnson*, 41 Ind. App. 44, 83 N. E. 358.

^{8c} *Whitcomb v. Roll*, 40 Ind. App. 119, 81 N. E. 106.

⁹ *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876.

¹⁰ *Jeffersonville Water Supply Co. v. Riter*, 138 Ind. 170, 37 N. E. 652.

¹¹ *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. 298; *Siegmund v. Kellogg*, 38 Ind. App. 95, 77 N. E. 1096.

contractor.¹² If the owner designates a time at which a building may be considered as completed, although it has been in fact completed prior thereto, the time will date from that suggested by the owner.¹³ If payment is refused, because the work is not satisfactory, and thereafter the mechanic makes changes to make it satisfactory, the time will date from the day the changes were made.¹⁴ In calculating time, it is considered proper to exclude the first and include the last day.^{14a}

2. Notice.

This notice or statement, as it is usually termed in mechanics' lien law, is a vital part of the mechanics' lien, and the courts hold that the lien itself is created by the filing of the notice with the recorder.¹⁵ Without such notice there can be no lien.¹⁶ In the case of laborers, if the debtor is in failing circumstances, the lien is good without the notice.¹⁷ Courts are not very strict as to the form of this notice so that it contain all of the requirements of the statute,¹⁸ and allow immaterial amendments to be made; but if the mistake is a material one it can not be corrected after the sixty-day limit has expired.¹⁹ It is sufficient if the signature is the owner's

¹² *Merritt v. Pearson*, 58 Ind. 385; *Andis v. Davis*, 63 Ind. 17.

¹³ *Whitcomb v. Roll*, 40 Ind. App. 119, 81 N. E. 106.

¹⁴ *Whitcomb v. Roll*, 40 Ind. App. 118, 81 N. E. 106.

^{14a} *Burns* 1908. § 1350. See *Towell v. Hollweg*, 81 Ind. 154.

¹⁵ *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883; *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070; *Northwestern Loan Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

¹⁶ *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883; *Adams v. Shaf-*

fer, 132 Ind. 331, 31 N. E. 1108.

¹⁷ *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770. See *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583; *National Supply Co. v. Stranahan*, 161 Ind. 602, 69 N. E. 447.

¹⁸ *Newhouse v. Morgan*, 127 Ind. 436, 26 N. E. 158; *Quaack v. Schmid*, 131 Ind. 185, 30 N. E. 514; *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152; *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

¹⁹ *Windfall Nat. Gas, &c., Co. v. Roe*, (Ind. App.) 85 N. E. 722.

name signed by his attorney.²⁰ If the land,^{20a} the person asserting the lien^{20b} and the value of the work or materials for which a lien is asserted^{20c} and the person to whom the notice is addressed^{20d} are shown the notice is sufficient. And there is authority to the effect that even the name of the owner is not essential,^{20e} though it is usually inserted.

3. *Itemized statement.*

It is not necessary that the statement be itemized; it is sufficient if it states the amount for which the lien is claimed.²¹ Where the materials have been furnished at different times, it should be in sufficient detail to advise the owner and others what is claimed. It ought to show whether the claim is due or not.²² But the failure to state such fact will not defeat the lien, as between the original parties. If third persons are misled thereby it is thought the rule would be different.²³ Under a recent statute suit to foreclose must be commenced within one year after the notice is filed unless the notice shows that the debt will not become due until a future date.^{23a} Neither is the statement necessarily void, if it claims more than is really due, unless such claim is made fraudulently.²⁴ Generally, it is said, a statement or notice is sufficient if it

²⁰ *Siegmund v. Kellogg*, 38 Ind. App. 95, 77 N. E. 1096.

^{20a} *Windfall N. G. Co. v. Roe* (Ind. App.) 84 N. E. 996; *Stephens v. Duffy*, 41 Ind. App. 385, 83 N. E. 268.

^{20b} *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132; *Simonds v. Buford*, 18 Ind. 176.

^{20c} *Siegmund v. Kellogg*, 38 Ind. App. 95, 77 N. E. 1096; *Rhodes v. Webb, Jameson Co.* 19 Ind. App. 195.

^{20d} *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132; *Maynard v.*

East, 13 Ind. App. 432, 41 N. E. 839.

^{20e} *Watson's Statutory Liens*, § 991; *Peck v. Hensley*, 21 Ind. 344; *Cleverly v. Mosely*, 148 Mass. 280.

²¹ *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598. See § 115.

²² *Wade v. Reitz*, 18 Ind. 307; *Schneider v. Kolthoff*, 59 Ind. 568.

²³ *Albrecht v. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157.

^{23a} Acts 1909, p. 335, §§ 3, 4.

²⁴ *Harrington v. Dollman*, 64 Ind. 255; *Albrecht v. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157.

states the amount, to whom, by whom, and for what due, and describes the premises.²⁵ In a notice for materials for a heating plant, in a hotel, a claim was sufficient when it was said that it was "for work and labor done, and materials furnished in the erection and construction of said house."²⁶

4. *Description of premises.*

The statute itself, gives a general rule as to what will constitute a sufficient description. A statement which contains a description of, or refers to the property intended in such a way that the lot or land can be identified, is sufficient in that particular.²⁷ A description of a gas well as located in section 9, when it should have been on section 10, a mile distant, will not support a lien on the well.²⁸ But a misdescription not defeating identification might not affect the owner or those acting through him.²⁹ If the description is sufficient to notify the owner of the land, of the property intended, a mistake in stating the addition of a town in which the lot is located, is immaterial.³⁰ And if a mistake is made in describing one lot in a lien, that will not affect another correctly described.³¹ Uncertain and indefinite descriptions may be aided by extrinsic evidence under proper averments in the petition.³² But if the notice does not really describe the land the lien is void, and

²⁵ *Simonds v. Buford*, 18 Ind. 176; *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218; *Jeffersonville Water Supply Co. v. Ritter*, 146 Ind. 521, 45 N. E. 697; *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

²⁶ *Siegmund v. Kellogg*, 38 Ind. App. 95, 77 N. E. 1096.

²⁷ *Stephens v. Duffy*, 41 Ind. App. 385, 83 N. E. 268. See § 103.

²⁸ *Windfall Nat. Gas, &c., Co. v. Roe* (Ind. App.), 85 N. E. 722.

²⁹ *McNamee v. Rauck*, 128 Ind. 59, 27 N. E. 423.

³⁰ *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685.

³¹ *Heyde v. Sult*, 22 Ind. App. 83, 52 N. E. 456.

³² *Crawfordsville v. Johnson*, 51 Ind. 397; *Crawfordsville v. Barr*, 65 Ind. 367; *White v. Stanton*, 111 Ind. 540, 13 N. E. 48; *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218; *Maynard v. East*, 13 Ind. App. 432, 41 N. E. 839, 55 Am. St. 238; *Northwestern Loan, &c., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

a description cannot be supplied.^{32a} If the petition or complaint correctly describes the lot, as between original parties, the fact that it was imperfectly described in the notice will not affect the lien. The fact that the statement claims more land than really should be within the lien, will not affect it, unless done for a fraudulent purpose.³³

5. *Date of lien.*

When the statement is properly filed, the lien dates from the time the person began to perform the labor or furnish the material. As to third persons, this will usually be when there was visible evidence on the premises that work had been done of a character coming within the mechanics' lien law. As between the owner and contractor, or material man, it will date from the time that such work was actually begun or the materials actually furnished.³⁴

6. *Duration of lien.*

The lien if filed in time, will continue until one year from the date after the notice has been received for record by the recorder and within that time proceedings shall be commenced to foreclose the same, unless the notice of the lien shows that it is not yet due, and discloses when the credit given will expire, and then within one year from the expiration of each credit.^{34a} It does not date from the time that the claim may be due, but from the time that the lien is filed with the recorder.³⁵ Under the statutory requirement that a mechanics' lien might be enforced "by filing a complaint"

^{32a} Windfall, etc., Co. v. Roe, Ind. App., 84 N. E. 996; McNamee v. Rauck, 128 Ind. 59, 27 N. E. 423; Munger v. Green, 20 Ind. 38.

³³ Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333; Dalton v. Hoffman, 8 Ind. App. 101.

³⁴ Burns 1908, § 8299, as reenacted by acts 1909, p. 295, § 5; Acts 1909, p. 335, §§ 3, 4. See § 130.

³⁵ Schneider v. Kolthoff, 59 Ind. 568. See § 131.

within one year, it was held unnecessary to cause a summons to issue to the sheriff within that period.³⁶ But a recent statute provides that "no action shall be brought" to foreclose such a lien after the debt has been due one year,^{36a} which makes it necessary to cause process to issue as an essential step in bringing the suit.^{36b} If not commenced within such period, all rights under the lien are lost.³⁷

§ 84. **Lien—Exemptions—Priority—Form—Indiana statute.**—There are no exemptions allowed against the claim of the mechanic, under the statute. The claim, however, is not superior to the inchoate interest of a married woman in the lands of the husband.³⁸ And in case of the husband's death owning less than \$500 worth of property his widow may take it all, including his interest in the land he has caused to be improved, freed from mechanics' liens for the husband's debts.^{38a} When the lien is properly filed, it then has priority over every other lien created thereafter, except the liens of other mechanics and material men.³⁹ The lien gives notice from the time of its filing, but relates back to the time when the articles were furnished,⁴⁰ and is prior to all liens of other kinds, created subsequent to that time.⁴¹ A lien existing previous to the time that the mechanics' lien attaches, is of course prior thereto.⁴² Such a lien to be superior

³⁶ *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

^{36a} Acts 1909, p. 335, §§ 3, 4.

^{36b} *Burns'* 1908, § 317; *Alexandria Gas Co. v. Irish*, 152 Ind. 535, 537; *Cruger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

³⁷ *Close v. Hunt*, 8 Blackf. (Ind.) 254; *Kulp v. Chamberlain*, 4 Ind. App. 560, 31 N. E. 376.

³⁸ *Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615; *Mark v. Murphy*, 76 Ind. 534.

^{38a} *Lloyd v. Arney* (Ind. App.) 87 N. E.

³⁹ *Krotz v. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273. See § 144.

⁴⁰ *Millikin v. Armstrong*, 17 Ind. 456; *Waldo v. Walters*, 17 Ind. 534.

⁴¹ *Mark v. Murphy*, 76 Ind. 534. *Burns'* 1908, § 8298, as reenacted, Acts 1909, p. 296, § 4.

⁴² *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218; *Thorpe Block Saving &c., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978; *Zehner v. Johnston*, 22

to the mechanics' must be properly perfected, and if a mortgage should remain unrecorded, until after the mechanics' liens are acquired, it loses its priority.⁴³ But where there is a prior lien, the statute gives the mechanic a lien on the particular building or improvement made by him, prior to the mortgage lien on the property.⁴⁴ If after contract with the owner to furnish materials, the owner conveys the land before the furnishing of the materials has begun, no lien can be acquired against the purchasing owner, but it will be otherwise if the furnishing of the materials had begun before the conveyance.⁴⁵

FORM OF NOTICE OF MECHANIC'S LIEN.

....., 19...

To and all others concerned:

You are hereby notified that intends to hold a mechanic's lien on as well as upon the house recently erected thereon by for the sum of dollars, for work and labor done, and materials furnished by in the erection and construction of said house, which work and labor done, and material furnished, was done and furnished by at your special instance and request, and within the last sixty days. Said debt thereby secured will become due on the day of, 19.. (or is now due).⁴⁶

.....

Ind. App. 452, 53 N. E. 1080. See § 151.

⁴³ Jenckes v. Jenckes, 145 Ind. 624, 44 N. E. 632; Northwestern Loan &c., Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130. See §§ 155-161.

⁴⁴ Burns' 1908, § 8296, as reenacted, Acts 1909, p. 296, § 2. See

§ 45a supra. Building &c., Assn. v. Coburn, 150 Ind. 684, 50 N. E. 885; Carriger v. Mackey, 15 Ind. App. 392, 44 N. E. 266.

⁴⁵ Jeffersonville Water Supply Co. v. Riter, 138 Ind. 170, 37 N. E. 652. See § 163.

⁴⁶ Acts Ind. 1909, p. 335, §§ 3, 4.

§ 85. **Claim or statement on one or more buildings or lots of land.**—The statutes generally provide that the lien shall attach to the "lot of land" upon which the buildings are located, and what will constitute or be included in this term "lot of land" is a question of fact for the jury to decide.¹ As a general rule it may be said that the term "lot of land" includes the whole lot or parcel of land belonging to the owner upon which the structure is located, or upon which the improvement is made.² One of the elements determining this question is the owner's use.³ No matter upon how many different buildings the work or materials may be furnished, if they are all on the same parcel or "lot of land" or appurte-

¹ *Crawfordsville v. Barr*, 65 Ind. 367; *Edwards v. Derrickson*, 28 N. J. L. 39; *Browne v. Smith*, 2 Browne (Pa.) 229. See Dec. & Am. Dig. tit. Mechanics' Liens, § 130.

² *Woodburn v. Gifford*, 66 Ill. 235; *Miller v. Hoffman*, 26 Mo. App. 199. Thus in *Edwards v. Derrickson*, 28 N. J. L. 39, it was held that a lien upon a mill would cover all the land known or used as the mill property, containing in all more than fifty acres. There were besides the mill several dwelling houses on the tract, which were usually occupied by persons employed in the mill. With one house there was enclosed seven or eight acres. The residue was in common. For thirty years the whole had been known and conveyed as one property. In *Choteau v. Thompson*, 2 Ohio St. 114, 123, the court says: "That by the words, 'lot of land upon which the same shall stand' is not meant merely the ground covered by the build-

ing; nor do they, necessarily, confine the lien to the particular lot as known on the town plat on which the building stands. On the contrary, where, as in the present instance, two adjacent town lots are used, without any actual division between them, as one mill lot, a part of the buildings and the machinery being upon one and a part upon the other, the lien extends to both lots, though the precise spot where the work was done, may be within the limits of one of them. And the case is the same, whenever two or more adjacent lots are thrown into one lot, the ideal lines of division being disregarded, and used for a common purpose, whatever that purpose may be." What would be included in the case of a dwelling or barn built upon a farm the court expressly refuses to decide.

³ *Gould v. Wise*, 18 Nev. 253; *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *Piario v. Bethel*, 75 Va. 825.

nant thereto,⁴ one claim covering all, will be sufficient.⁵ This may be true though the work is done under different contracts.⁶ But if the amount properly chargeable to each building can be ascertained, separate liens may, and perhaps ought to be filed.⁷ If several owners of several contiguous lots treat the property as one tract, in making the contract, one lien statement will be sufficient.⁸ As a general rule if the buildings are on different lots or parcels, a lien statement must be filed for each tract.⁹ And even where the lots are con-

⁴ *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314.

Common Purpose.—Where materials are furnished for one or more of several buildings on a large tract of land used for a common purpose, a lien may be filed against the particular building or buildings for which the materials were furnished and the appurtenant lots. *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. 248.

⁵ *Indiana*.—*Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876.

Minnesota.—*Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3.

Missouri.—*Flanagan v. O'Connell*, 88 Mo. App. 1.

Pennsylvania.—*Law v. Levine*, 13 Pa. Super. Ct. 152; *Donahoo v. Scott*, 12 Pa. St. 45.

Washington. — *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38.

Where 31 houses were built on a tract of land, the fact that two alleys, 31 feet wide, were left for purposes of ingress, leaving the houses in three blocks, the houses were not so separated as to re-

quire a distinct notice of lien for each house. *Miller v. McDuffee*, 12 Pa. Co. Ct. 381.

⁶ *House and barn*. *Fitch v. Baker*, 23 Conn. 563. *Cement walks*. *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746.

⁷ *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3; *Hill v. Gray*, 81 Mo. App. 456. Where materials were furnished indiscriminately on the credit of different buildings erected at the same time, some on one side of the street, and some on the other, separate mechanics' liens may be filed against each property, but the claimant may not designate by an apportionment the amount for which each house is liable, when he is unable to offer any direct evidence to show that any of the materials claimed in the bill of particulars were furnished on the credit of the particular house against which the lien in suit was filed. *Jeanette Planing Mill Co. v. Greenawalt*, 11 Pa. Super. Ct. 157.

⁸ *Deegan v. Kilpatrick*, 66 N. Y. Supp. 628, 54 App. Div. 371.

⁹ A lumber dealer sold lumber for three paper mills, belonging to the same owner, which were

tiguous, if the buildings are erected under separate contracts, the lien statements should be separate.¹⁰ And it has also been held that the lien statements should be separate where the buildings are on contiguous lots, even if all were erected under an entire contract.¹¹ But other courts hold where the con-

undergoing repairs, two upon one piece of land, and the third upon a separate piece, keeping a separate account of the lumber furnished to each. He afterward filed a certificate of his lien, describing the three mills together, and his lien as one lien upon the whole, and stating the whole amount due him as the amount of his lien. Held, that the certificate was void, both in respect to the description of the premises covered by the lien and in respect to the statement of the amount. *Chapin v. Persse & Co., Paper Works*, 30 Conn. 461, 79 Am. Dec. 263.

District of Columbia.—*Alfred Richards Brick Co. v. Trott*, 23 App. D. C. 284.

Illinois.—*Aurand v. Martin*, 188 Ill. 117, 58 N. E. 926.

Indiana.—*McGrew v. McCarty*, 78 Ind. 496; *Hill v. Braden*, 54 Ind. 72.

Massachusetts. — *Osborne v. Barnes*, 179 Mass. 597, 61 N. E. 276.

Rhode Island. — *McElroy v. Kelly*, 27 R. I. 474, 63 Atl. 238.

¹⁰ **Connecticut.** — *Larkins v. Blakeman*, 42 Conn. 292.

Kansas. — *North and South Lumber Co. v. Hegwer*, 1 Kan. App. 623, 42 Pac. 388.

Missouri.—*Fitzpatrick v. Thomas*, 61 Mo. 512, 515; *Aimee Real-*

ty Co. v. Haller, 128 Mo. App. 66, 106 S. W. 588.

Pennsylvania.—*Goepp v. Gartzler*, 3 Phila. (Pa.) 335.

A claim which contains a statement of materials furnished for repairs, on a house, and also materials furnished for repairs on a fence, and claiming a lien on both house and fence, is defective. *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407.

¹¹ *Halsted & Co. v. Arick*, 76 Conn. 382, 56 Atl. 628; *Fitzpatrick v. Thomas*, 76 Mo. 513; *Atkinson v. Shoemaker*, 151 Pa. St. 153, 25 Atl. 59, 30 W. N. C. 567. Lots separated by alley 15 feet wide, not contiguous; *Missouri Central Lumber Co. v. Sedalla Brewing Co.*, 78 Mo. App. 230, 2 Mo. App. Repr. 189. The "lot of land," to which a mechanic's lien attaches in towns, cities, and villages (*Wag. St.* pp. 907, 908, § 1), means the lot as bounded and described on the plats, or as subdivided and bounded by conveyances of the owners, or by other acts done by them for that purpose. And where there are a number of lots, each containing a separate building, although the lots are contiguous and in a compact body of land, and without division fences, a single lien filed against all the lots as one parcel of land, for

tract is entire and the lots contiguous,¹² or even when not contiguous,¹³ if the claimant can and does show in the statement what went into each structure, one lien statement may cover all.¹⁴ Under a statute that allowed one lien statement to be filed on "adjoining houses" it was held in order to adjoin, they must not be separated by streets.¹⁵ However, the dedication of the street after the houses were commenced, will not prevent them from being "adjoining" houses, since the right is determined from the condition of the ground at the time the buildings were commenced.¹⁶ Where buildings are erected for different owners, whether on contiguous lots,¹⁷ or not,¹⁸ or where they are erected under a several or joint contract,¹⁹ separate lien statement must be filed.²⁰ The lien right will be lost if the materials are so commingled that they cannot be apportioned and a separate statement filed.²¹ Where

the aggregate value of all the work done and material furnished on the several houses, is invalid; nor can it aid the lien that the whole work was done under one contract, and not under separate contracts for each building. *Fitzgerald v. Thomas*, 61 Mo. 499.

¹² *Sprague Inv. Co. v. Mouat Lumber, &c., Co.* (Colo. App.), 60 Pac. 179; *Flanagan v. O'Connell*, 88 Mo. App. 1; *Bickel v. Fray*, 81 Mo. App. 653; *Chambers v. Yarnall*, 15 Pa. St. 265.

¹³ *Cocciola v. Wood-Dickerson Supply Co.*, 136 Ala. 532, 33 So. 856; *Williams v. Judd-Wells Co.*, 91 Iowa 378, 59 N. W. 271; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, 60 N. W. 576; *Chadbourn v. Williams*, 71 N. Car. 444.

¹⁴ *Aurand v. Martin*, 87 Ill. App. 337; *Hines v. Cochran*, 44 Neb. 12, 62 N. W. 299; *Byrd v. Cochran*, 39 Neb. 109, 58 N. W.

127; *Culver v. Lieberman*, 69 N. J. L. 341, 55 Atl. 812. Partnership. *Hill v. Gray*, 81 Mo. App. 456.

¹⁵ *Lucas v. Hunter*, 153 Pa. St. 293, 25 Atl. 827, also 11 Pa. Co. Ct. 343; *Allen v. Fitzpatrick*, 9 Phila. (Pa.) 142, 30 Leg. Int. (Pa.) 240; *Schultz v. Asay*, 2 Penny. (Pa.) 411.

¹⁶ *Atkinson v. Shoemaker*, 151 Pa. St. 153, 25 Atl. 59, 30 W. N. C. 567; *Kline's Appeal*, 93 Pa. 422.

¹⁷ *Gruner &c., Lumber Co. v. Nelson*, 71 Mo. App. 110.

¹⁸ *Kerbaugh v. Henderson*, 3 Phila. (Pa.) 17.

¹⁹ *Rathbun v. Hayford*, 5 Allen (Mass.) 406.

²⁰ *Bartlett v. Bilger*, 92 Iowa 732, 61 N. W. 233.

²¹ *Cahill v. Capen*, 147 Mass. 493, 18 N. E. 419; *Reitz v. Ghio*, 47 Mo. App. 287; *Gorgas v. Douglas*, 6 Serg. & R. (Pa.) 512.

the contract is joint, and the several owners treat the entire contract as one, then one lien statement is sufficient.²² As a general rule where the houses are all erected under one general contract,²³ and on contiguous lots,²⁴ owned by one person,²⁵ one lien statement is sufficient.²⁶ Where the claimant can separate the claim for materials, etc., furnished at dif-

²² *Mandeville v. Reed*, 13 Abb. Prac. (N. Y.) 173; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712. Where the several owners of two contiguous lots jointly contract for their excavation, treating the lots as one parcel, and jointly obligating themselves to pay for the work done at an agreed price per cubic yard, irrespective of the question of title, the contractors may treat the lots as one parcel in filing a notice and enforcing a lien against the same, and need not proceed against the lots separately. *Deegan v. Kilpatrick*, 66 N. Y. Supp. 628, 54 App. Div. 371.

²³ *Bulger v. Robertson*, 50 Mo. App. 499; *Walden v. Robertson*, 120 Mo. 38, 25 S. W. 349. A structure erected on two lots, as one building, but divided by a partition wall, having an open court between the two parts above the first story, both being heated by the same steam plant, and a porch with a continuous roof extending across the rear of the entire structure, is one building, and a lien thereon need not be apportioned. *Bastrup v. Prendergast*, 179 Ill. 553, 53 N. E. 995. An owner of two adjacent lots ran a fence midway across them, building a house on one lot and a barn on the other, but within

the same inclosure. The buildings were 30 feet apart, but constituted the home residence of the owner. Work and materials were applied to both buildings, and the separate value on each was not found. Held, that a single notice of mechanics' liens against the two lots was sufficient. *Northwestern Loan &c., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

²⁴ *Bulger v. Robertson*, 50 Mo. App. 499.

Contiguous Lots.—Rev. St. 1899, § 6729, provides that a single mechanic's lien may be taken on "contiguous" lots. Held, that lots separated by an alley are not "contiguous," and that, where a lien is filed within six months after the completion of a building on one lot, but not within six months after the completion of a building on a lot separated therefrom by an alley, the lien is insufficient as to the latter lot. *Bolen Coal Co. v. Ryan*, 48 Mo. App. 512.

²⁵ *Moran v. Chase*, 52 N. Y. 346; *Willamette Steam Mills, &c., Mfg. Co. v. Shea*, 24 Ore. 40, 32 Pac. 759.

²⁶ *Arkansas*.—*Tenney v. Sly*, 54 Ark. 93, 14 S. W. 1091.

Connecticut.—*Marston v. Kenyon*, 44 Conn. 349.

ferent times, it has been held that he may file either a separate claim on each building or one claim on all.²⁷ However, on double houses, one claim should be filed.²⁸ A claimant may waive or release part of his claim without releasing his right to a lien on the remainder.²⁹ But work or material furnished on a released building cannot be included in a lien on the remainder,³⁰ and the ripened interests of third persons cannot be affected by any release.³¹ Distinct claimants cannot file a joint statement,³² unless the statute so provides.³³

§ 86. Claim or statement—Place and mode of filing.—The claim must be filed in the place designated by statute.¹ Where the law requires filing in an office which does not exist, a fil-

Missouri.—*Waben v. Robertson*, 120 Mo. 38, 25 S. W. 349; *Dear-dorff v. Roy*, 50 Mo. App. 70; *O'Leary v. Roe*, 45 Mo. App. 567; *Schroeder v. Mueller*, 33 Mo. App. 28.

Washington. — *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709.

²⁷ *Kick v. Doerste*, 45 Mo. App. 134.

²⁸ *Halsted, &c., Co. v. Arick*, 76 Conn. 382, 56 Atl. 628; *McKelleget v. Eckhard*, 4 Mo. App. 589; *Boyd v. Mole*, 9 Phila. (Pa.) 118, 30 Leg. Int. (Pa.) 116.

²⁹ *Carr v. Hooper*, 48 Kan. 253, 29 Pac. 398; *Meixell v. Griest*, 1 Kan. App. 146, 40 Pac. 1070; *Contra. Schulenberg v. Vrooman*, 7 Mo. App. 133. Where the plaintiff, in a suit against adjoining lot owners, under a contract for the erection of one building thereon, dismisses as to one defendant and seeks to enforce his lien, proportionately reduced,

against the others, the latter will not be heard to complain of such apportionment. *Carter Lumber Co. v. Simpson*, 83 Tex. 370, 18 S. W. 812.

³⁰ *Nickel v. Blanch*, 67 Md. 456, 10 Atl. 234; *Wilson v. Wilson*, 51 Md. 159.

³¹ *Reilly v. Williams*, 47 Minn. 590, 50 N. W. 826.

³² *McGrew v. McCarty*, 78 Ind. 496.

³³ *Hopkins v. Jamieson—Dixon Mill Co.*, 11 Wash. 308, 39 Pac. 815.

¹ **Maine.**—*Skillin v. Moore*, 79 Me. 554, 11 Atl. 603.

Massachusetts.—*Weeks v. Walcott*, 15 Gray (Mass.) 54.

New York.—*Hawkins v. Mapes-Reeves Const. Co.*, 32 App. Div. (N. Y.) 72, 81 N. Y. Supp. 794; *Bell v. Vanderbilt*, 67 How. Prac. (N. Y.) 332, 12 Daly (N. Y.) 467; *Terwilliger v. Wheeler*, 81 App. Div. 460, 81 N. Y. Supp. 173.

ing in another like office will not avail and there is no lien.² As to the place of filing, the law in force at the time the lien is filed controls.³ To constitute a proper filing, the claim or statement should be placed in the custody of the officer designated by statute.⁴ As the object and purpose of filing is to give prospective incumbrancers or purchasers notice of a possible lien, it should be filed in the county,⁵ or in the place for the filing of incumbrances against the particular property.⁶ If located in different governmental divisions a lien must be filed in each.⁷ It is immaterial who performs the act of filing.⁸ But the claim should be made out by the person furnishing the materials, or his authorized agent.⁹ If the statement is properly made out and filed, it will be good between the parties, although the officer fails to record it according to law.¹⁰ As to third

North Carolina.—Boyle v. Robins, 71 N. Car. 130.

Rhode Island.—Gurney v. Walsham, 16 R. I. 698, 19 Atl. 323; see Dec. & Am. Dig. tit. Mechanics' Liens, § 131.

² Cheney v. Wolf, 2 Lans. (N. Y.) 188.

³ Willim v. Bernheimer, 5 Minn. 229; Whipple v. Christian, 15 Hun (N. Y.) 321 Waring v. Miller, etc., Mfg. Co., 36 S. Car. 310, 15 S. E. 132.

⁴ Watkins v. Bugge, 56 Neb. 615, 77 N. W. 83. Giving the statement to the town clerk at the latter's house, is a sufficient filing, if the clerk notes thereon the time it was received, although he does not take it to his office and record it until after the prescribed time of filing has expired. Wood v. Simons, 110 Mass. 116.

⁵ Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 66 Fed. 683;

J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co. (N. J.), 68 Atl. 215.

⁶ Boston v. Chesapeake, etc., R. Co., 76 Va. 180.

⁷ Bringham v. Knox, 127 Cal. 40, 59 Pac. 198.

⁸ Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873.

⁹ Deatherage v. Woods, 37 Kan. 59, 14 Pac. 474. See § 74.

¹⁰ **Indiana.**—Adams v. Shaffer, 132 Ind. 331, 31 N. E. 1108; Willson v. Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. 426; Adams v. Buhler, 131 Ind. 66, 30 N. E. 883; Willson v. Hopkins, 51 Ind. 231; Leeper v. Myers, 10 Ind. App. 314, 37 N. E. 1070.

Minnesota.—Smith v. Headley, 33 Minn. 384, 23 N. W. 550.

Missouri.—Cornelius v. Grant, 8 Mo. 59.

Pennsylvania.—Irish v. Harvey, 44 Pa. St. 76.

persons, however, it will be void.¹¹ If the statute makes the recording of the claim the foundation of the lien, then, if not recorded as provided by statute, it will be void even as between the original parties.¹² The time of actual delivery of the statement for filing prevails,¹³ and not the time endorsed thereon,¹⁴ nor the time of the recording.¹⁵ The statement is legally filed when it is put in possession of the proper officer.¹⁶

Wisconsin.—*Goodman v. Baer-
locher*, 88 Wis. 287, 60 N. W. 415,
43 Am. St. 893.

¹¹ *Falkner v. Colshear*, 39 Ind. 201; *Appeal of Cessna* (Pa.), 10 Atl. 1. *Sayles Civ. St. Art.* 3165, Texas, which requires mechanics' liens to be recorded by the county clerk in a book kept for that purpose, does not make it necessary that they be recorded in a book kept exclusively for that purpose, and a record thereof in the general deed record books is sufficient where it appears that such books were also kept and used to record mechanics' liens, and that no book was kept in the county clerk's office for such purpose alone. *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278; see also, *Bosley v. Pease*, 86 Tex. 292, 24 S. W. 279; *Bassett v. Brewer*, 74 Tex. 554, 12 S. W. 229; *Lyon v. Logan*, 68 Tex. 521, 5 S. W. 72, 2 Am. St. 511; *Quinn v. Logan*, 67 Tex. 600, 4 S. W. 247.

¹² Under that part of Pub. St. c. 177, § 5, as amended by Pub. Laws, 1888, c. 696, § 4, which provides that "no lien shall attach for materials furnished, unless

the person furnishing the same" shall give notice, as required, and "place a copy of said notice on record—in a book to be kept for that purpose," the mere filing of the copy is not enough; nor is the mere recording of the names of the parties to the notice, with a minute of the time when the copy was filed, a sufficient recording. *Dodge v. Walsham*, 16 R. I. 704, 19 Atl. 326.

Duly recorded.—A statement of lien is not duly recorded by merely handing it to the recording officer after office hours, with a request to record it. *Jewett v. Darlington*, 1 Wash. T. 601.

¹³ *Orne v. Barstow*, 175 Mass. 193, 55 N. E. 896; *Lang v. Menasha Paper Co.*, 96 N. W. 393, 119 Wis. 1. **Unauthorized shipment.** *Canton &c., Machine Co. v. Rolling Mill Co. of America*, 155 Fed. 321.

¹⁴ *Grubbs v. Cones*, 57 Mo. 83; *Bruce v. Hoos*, 48 Mo. App. 161; *Spencer v. Doherty*, 17 R. I. 89, 20 Atl. 232.

¹⁵ *Speakman v. Knight*, 3 Phila. (Pa.) 25.

¹⁶ *Orne v. Barstow*, 175 Mass. 193.

§ 87. **Filing notice by subcontractor with recorder to notify fellow laborers.—Ohio statute.**—Section 3195 of the Ohio statutes provides that such subcontractor, material man, mechanic, laborer or person so filing his statement with the owner, board, officer, or authorized clerk or agent or attorney thereof, shall, in order to notify his fellow subcontractors, material men, mechanics and laborers, at the same time file a copy thereof with the recorder of the county where such property is situate, which if he fail to do, the filing of the notice with the owner, board, officer, or authorized clerk, agent or attorney thereof shall give him no preference over other claimants; and for filing or making any copy of such statement or certificate of the date of such filing the recorder shall be entitled to the same fees as are provided by law for similar services in regard to chattel mortgages.¹ A previous section,² requires the notice to be filed with the owner. Now in order that fellow subcontractors and interested parties may know that such a claim is made, the person claiming a subcontractor's lien must file a notice with the recorder. The same rules apply here as apply to the filing of the notice by the principal contractor with the recorder.³ In an early case⁴ it was held that it would be sufficient to protect the claims of all subcontractors, if this notice was filed by one of the subcontractors. A later case, however,⁵ seems to incline to the opinion that all subcontractors, who have a claim on the owner, should not only give notice to the owner, but should also file their claims with the recorder.⁶ Where no interests are affected, except those of the owner and the subcontractor filing the notice, it would not be material whether the notice was

¹ 97 Ohio Laws, 501.

² See § 59.

³ See § 44.

⁴ *Kennett v. Rebholz*, 6 Ohio Dec. (Re.) 824, 8 Am. L. Rec. 354; 4 Ohio L. Bull. 959.

⁵ *Hayden Saddlery Hardw. Co. v. Slade*, 3 Ohio C. C. 67, 2 Ohio Cir. Dec. 38.

⁶ *Geller v. Puchta*, 1 Ohio Cir. Dec. 18, 1 Ohio C. C. 30.

filed in the recorder's office or not.⁷ It should be observed that this statute says that a copy and not the original account shall be filed with the recorder. It is sufficient to make a copy of the notice required under Section 3193,⁸ which has been served by delivery to the owner. The following affidavit should be attached:

The State of Ohio, ... County, ss.

E. F. (or whoever makes the service), being duly sworn, says that the foregoing (or annexed) is a full, true and complete copy of the notice, exhibit and affidavit personally served upon C. D., by delivering the same to him at o'clock, ... M., on, this day of, A. D. 19...

Sworn to and subscribed before me and subscribed in my presence this day of, A. D. 19...

(Signature and Seal of officer.)

§ 88. When and how subcontractor may obtain lien on the property of the owner—Ohio statute.—Section 3201 of the Ohio statutes provides that if out of subsequent payments, as they severally fall due under the contract, and for ten days thereafter, the owner or his authorized agent neglect or refuse to pay, when due, the whole or a pro rata amount, as the case may be, of the sworn statement or estimate of any subcontractor, material man, laborer or mechanic, such subcontractor, material man, laborer or mechanic shall file, within four months thereafter, with the recorder of the county where in the property is situate, an affidavit containing an itemized statement and description of any note with the amount and value of such labor, machinery, or material with all credits and set-offs thereon, together with the statements required by sections three thousand one hundred and eighty-five or three

⁷ Keating v. Worthington, 11 Bull. 14.
Ohio Dec. (Re.) 428, 27 Ohio L. ⁸ See § 59.

thousand one hundred and eighty-seven, as the case may be, from principal contractors, and shall thereby have a lien to secure the payment of such claim upon the boat, vessel or other water craft, or upon the house, mill, manufactory, building, appurtenance, fixture, bridge, or other structure or gas well, oil well or other well upon which the labor was done, or machinery or material were furnished, and upon the interest of the owner in the lot of land on which the same stands, or to which it may be removed, which lien shall date back to the date of the furnishing of the first item of such labor, machinery or material and have the same operation, effect and duration, and be subject to the same obligation with respect to the owner, as the lien of a head contractor in similar cases.¹

1. *Generally.*

This section of the Ohio law is distinguished from a previous section (3193),² in that it gives a lien to the subcontractor on the owner. The sections, 3193,³ 3194,⁴ and 3198,⁵ provide a method of asserting a personal liability against the owner. The suit can be brought against the owner, holding him responsible to the extent of the moneys in his hands coming to the principal contractor, at the time the notice of the claim was given to him. Before a lien can be obtained on the property of the owner, these conditions precedent must be shown, that is, first, that the claim was properly made out and served upon the owner; secondly, that a copy was filed in the recorder's office; third, that the owner has notified the head contractor of such claim being filed with him, and fourth, that the head contractor has not in writing disputed the claim within the five days limited by law.

¹ 97 Ohio Laws, 502.

⁴ See § 91.

² See § 59.

⁵ See § 92.

³ See § 59.

2. *By whom filed.*

The lien may be filed by the persons mentioned in Section 3193,⁶ that is, by subcontractors, material men, laborers or mechanics. Much of the detail in reference to the lien is very similar to that required of the principal contractor in perfecting his lien on the property under Section 3185.⁷ Of course, it must be shown that the owner has neglected or refused to pay whatever may be due the claimant. The lien will only attach to the amount which may be recovered in a personal action against the owner. The proceeding under this section is used in cases where the owner is not financially responsible, or where the claimant wishes to assert his claim, on the improvement.

3. *Form of lien of subcontractor, etc., on real estate.*

State of Ohio, Clark County, ss.

E. F. (or, the authorized agent of E. F.), being first duly sworn, says: That in pursuance of a contract between one A. B., a principal (or sub) contractor, and said E. F., of the day of, 19.., of which the following is a true copy, to-wit.: (Here copy contract between subcontractor or laborer or material-men and principal contractor); or if not in writing, then so state, giving substance, amount, value and items furnished). That he has furnished labor (machinery or materials) of the amount and value stated in the itemized account hereto attached marked exhibit "A," and made a part hereof, for the purpose and which were used in the construction (repair or alteration) of a certain dwelling-house (or other structure or turnpike) to said A. B., a principal contractor, constructed (or repaired) by him under and by virtue of his contract in writing of the day of, 19.., a copy of which is as follows:

⁶ See § 59.

⁷ See § 81.

(Here set out copy of contract between principal contractor and owner; if not in writing, state substance, or if it is in writing and affiant is unable to get a copy, so state.)

He has received from the said A. B. thereon the following notes, to wit.: (Here give itemized statement or description of all notes so received.) That said dwelling house (or other structure or turnpike, etc.) was erected and is situate upon the following premises of which the said C. D. is owner, within the City of Springfield, County of Clark, and State of Ohio, bounded and described as follows, to-wit.: (Here describe premises so accurately that sheriff may locate.)

That on the day of, 19.., he served said C. D. with a sworn affidavit of his said contract with said A. B. and of his intention to furnish said labor (or materials or machinery) as above mentioned and in the attached exhibit hereto, marked "A."

(If the labor or materials have already been furnished, say that on the day of, 19.., he served said C. D. with a sworn and itemized statement of said labor, etc., with the amount and value thereof, and on the same day filed a copy thereof with the recorder of Clark County, Ohio.)

That said A. B. has not notified the said C. D. in writing that said claim is disputed, and has thereby assented to the correctness of said claim.

That the said C. D. has neglected and refused to pay his said account or part thereof out of the subsequent payments under said C. D.'s contract with said A. B. as they became due, and within ten days thereafter, whereby, under the provisions of the mechanic's lien law, he has become, and is, entitled to a lien upon said premises, which he now claims and asserts from the day of, 19.. (date of first item in account) for the full amount of \$....., his said claim, with interest, from the day of, 19..

E. F.

Sworn to and subscribed before me and in my presence
this day of, 19... H. I., Notary Public.

§ 89. Lien entitled to priority over lien of head contractor—Ohio statute.—Section 3202 of the Ohio statutes provides that such lien shall be superior to any already taken or to be taken by the head contractor in respect of the same labor, machinery, fuel, or material, and the liens of laborers, mechanics, or persons furnishing machinery, fuel or material to a contractor or subcontractor, shall be superior to any lien taken or to be taken by such contractor or subcontractor indebted to them in respect to such labor, machinery or material. The lien of a promissory note described in any such statement shall take effect from the date of the first item included in such notes, and an assignment or transfer by such head contractor, or subcontractor, of his contract with the owner, or head contractor, as well as all proceedings in attachment, or otherwise, against such head contractor or subcontractor, to subject or incumber his interest in such contract, shall save and be subject to the claims of every laborer, mechanic, subcontractor or material man, who has furnished any labor, machinery, fuel or material towards the construction, alteration, removal, or repair of any building or other property designated in this chapter.¹ If the lien of the subcontractor is properly filed, as provided in section 3201,² then the lien attaches to the real estate upon which the improvement stands, and dates as therein stated, from the first item of the labor or machinery furnished. If a note has been taken, then the priority extends back to the first item in the note. The fact that a note has been taken makes no difference as to such priority. The fact that the principal contractor has assigned or transferred what is due him, does not affect the subcontractor's claim. Of

¹ 97 Ohio Laws, 503.

Elec. L. Co., 6 Ohio Dec. 475,

² See §§ 88, 144, 211; Brush

4 Ohio N. P. 279.

Electric Light Co. v. Warwick

course if the principal contractor had made assignments, and the owner had accepted such assignments, before notice was given to him, then such assignment would take precedence, notwithstanding the language of the statute. The lien provided in Sections 3201 and 3202,³ merely gives a cumulative right to the subcontractor, and the subcontractor can sue the owner, and recover a personal judgment, provided all the necessary steps have been complied with.⁴

§ 90. Claim or statement—Notice of filing.—Statutory requirements in reference to notice to the owner of the filing of a statement for a lien, must be complied with.¹ Much that was said in an earlier section on the subject of notice to owner applies here.² The particular object of notice to the owner is to enable the subcontractors to attach a lien to the fund, and prevent payment to principal contractor. Notice of the filing of the statement or lien, is for the purpose of notifying the owner and incumbrances, that there is a lien claimed on the property.³ It cannot be served upon an agent unless the statute so provides.⁴ If served on an agent, it must be shown that the acceptance of the notice was within the scope of the agent's authority.⁵ In some cases, it has been held that actual notice will not dispense with the giving of the notice required

³ See §§ 88, 89.

⁴ See § 288.

¹ **Colorado.**—Sayre - Newton Lumber Co. v. Park, 4 Colo. App. 482, 36 Pac. 445.

Iowa.—Walker v. Queal, 91 Iowa 704, 58 N. W. 1083.

Maryland.—Fulton v. Parlett & Parlett (Md.), 64 Atl. 58.

Michigan.—Hannah & Lay Mercantile Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120; Bourget v. Donaldson, 83 Mich. 478, 47 N. W. 326; Waters v. Johnson, 134

Mich. 436, 96 N. W. 504, 10 Detroit Leg. N. 513.

² See § 74.

³ Lee v. O'Brien, 54 Tex. 635; Lee v. Phelps, 54 Tex. 367; Tremont Hotel Co. v. Rosamond, 2 Posey Unrep. Cas. (Tex.) 682.

⁴ Wickham v. Monroe, 89 Iowa 666, 57 N. W. 434.

⁵ Crawfordsville v. Irwin, 46 Ind. 438; Steele v. McBurney, 96 Iowa 449, 65 N. W. 332; Smith v. New York, 32 Misc. (N. Y.) 380, 66 N. Y. Supp. 686; proper officer of board; Maddocks v.

by statute.⁶ But the giving of such notice as between the original parties may be waived.⁷ If notice is required to be given by copy and no time limit is provided, then it must be given with reasonable diligence,⁸ within a reasonable time.⁹ If the owner makes it impracticable to serve him with notice as required by statute, then service will be excused.¹⁰ In cases where work is done on separate properties, the better way is to give a notice for each property, although it may be valid where but one lien statement is filed, especially if the rights of third parties are in no way affected.¹¹ Proof of service is made the same as proof of notice in other cases, and it will be sufficient though not made on the date of the service,¹² or even until after the proceedings on the lien have been commenced.¹³ Where the claim is properly filed, and the lien attaches to the property, all payments made thereafter are subject to the lien,¹⁴ that is, if the lien is filed at the proper time.¹⁵ But if it is filed prematurely,¹⁶ or improperly filed,¹⁷ it is a nullity. A second lien filed at the proper time, however, will

McGann, 4 Lack. J. (Pa.) 34, 12 Dist. (Pa.) 701. Under the mechanics' lien law, requiring "the duplicate copy of the bill of particulars to be served on the party owing the debt," in order to fix the lien, service on the chairman of an Odd Fellows' building committee, who possesses no other powers than those pertaining to that particular undertaking, is not sufficient. It should be served on a principal officer of the lodge. *McCreary v. Waco Lodge*, 2 Posey Unrep. Cas. (Tex.) 675.

⁶ *Frost v. Rawson*, 91 Iowa 553, 60 N. W. 131.

⁷ *Mouat v. Fisher*, 104 Mich. 262, 62 N. W. 338.

⁸ *Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338.

⁹ *Deatherage v. Henderson*, 43 Kan. 684, 23 Pac. 1052.

¹⁰ *Read v. Gillespie*, 64 Tex. 42; *Warren v. Smith*, 44 Tex. 245.

¹¹ *Alfred Richards Brick Co. v. Trott*, 23 App. D. C. 284.

¹² *Smalley v. Northwestern Terra-Cotta Co.*, 113 Mich. 141, 71 N. W. 466.

¹³ *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386.

¹⁴ *Kelly v. Bloomingdale*, 139 N. Y. 343, 34 N. E. 919.

¹⁵ See § 71.

¹⁶ *Mechanics', &c., Lumber Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073.

¹⁷ *Davis v. Livingston*, 29 Cal. 283; *Mulloy v. Lawrence*, 31 Mo. 583.

be valid.¹⁸ Only one valid claim or statement can be filed.¹⁹ Where the statement or claim is to be filed and the abstract made,²⁰ or the claim is to be recorded, the original may be withdrawn after it is recorded.²¹ A temporary withdrawal even where it is not proper so to do, will only affect rights of persons who may be injured thereby. If notice is properly given, it is good as to all having notice, especially as between the original parties.²²

§ 91. Upon notice owner shall retain subsequent payments due contractor—Ohio statute.—Section 3194 of the Ohio Statute provides that upon receiving the notice required by the preceding section, such owner, board or officer or public authority or authorized clerk, agent or attorney, thereof, shall detain in his hands all subsequent payments from the principal or subcontractor to secure such claims and the claims and estimates of other subcontractors, material men, laborers, mechanics, or persons furnishing materials to or performing labor for any contractor or subcontractor who may intervene before the next subsequent payment under the contract or within ten days thereafter.¹ When the owner has received the notice provided for in Section 3193,² then he is bound to retain in his possession whatever funds may be due to the principal contractor. If one subcontract-

¹⁸ *Mechanics' Planing Mill Co. v. Nast*, 7 Mo. App. 147. Where the mechanics' lien law does not provide for filing joint liens, and no community of interest exists, an attempt to file a joint lien, does not prevent the several lien claimants from filing valid individual liens. *Skyrme v. Occidental &c., Mining Co.*, 8 Nev. 219; see also, *Chambers v. Yarnall*, 15 Pa. 265; *Bournonville v. Goodall*, 10 Pa. 133; *Clark v. Miller*, 14 Pa. Co. Ct. 227.

¹⁹ *Hormann v. Wirtel*, 59 Mo. App. 646.

²⁰ *Bell v. Teague*, 85 Ala. 211, 3 So. 861.

²¹ *Mars v. McKay*, 14 Cal. 127; *Bell v. Teague*, 85 Ala. 211, 3 So. 861.

²² *Great Spirit Springs Co. v. Chicago Lumber Co.*, 47 Kan. 672, 28 Pac. 714.

¹ 99 Ohio Laws, 501; see § 128.

² See § 59.

or serves the notice, and there is more in the owner's hands than will pay this one, the owner may pay the balance to the contractor.³ The statute simply requires him to retain what may become due under the contract at the time the notice is received.⁴ If the claim is not disputed he must pay to the subcontractor.⁵ However, it seems the owner is bound to retain all moneys in his hands for ten days after such notice is given, and this will permit other subcontractors to participate if they intervene within the ten days' limit.^{5a} The provision should be construed to mean that he must hold an unpaid and overdue payment.⁶ If the amounts are found and ready to be paid, but are in fact not paid, but retained for the benefit of those filing accounts, this appropriates the amount to them the same as if paid, their rights are fixed, and not changed by the filing of subsequent accounts.⁷

§ 92. Copy of statement to be furnished to head contractor: his duty—Ohio statute.—Section 3198 of the Ohio statute provides that the owner, board, officer, or clerk, agent or attorney thereof, upon the receipt of such statement, shall, or the lien claimant, his agent or attorney, in the name of such owner, board or officer, may, furnish the principal contractor or subcontractor with a copy thereof, within five days after receiving the same, and if such principal or subcontractor fail, within five days after such receipt by him, to notify, in writing, such owner, board, officer, or clerk, agent or attorney thereof of his intention to dispute such claim, he shall be considered as assenting to the correctness thereof, and thereupon such subsequent payment shall be applied by such owner, his agent or at-

³ McCullom v. Richardson, 2 (Re.) 441, 13 Wkly. L. Bull. 542; Handy (Ohio) 274.

^{5a} See § 147.

⁴ Feldner v. Voight, 4 Am. L. Rec. 671; 5 Ohio Dec. (Re.) 336; 5 Am. L. Rec. 1, 1 Ohio L. Bull. 116, 5 Ohio Dec. (Re.) 349, 7 Ohio Dec. (Re.) 109.

⁶ Tollhels v. James, 11 Ohio Dec. (Re.) 213, 25 Wkly. L. Bull. 277; affirmed 4 Ohio Cir. Dec. 646; 7 Ohio C. C. 386.

⁷ Cincinnati v. McNeely, 7 Ohio Dec. (Re.) 216, 1 Wkly. L. Bull.

⁵ Busse v. Voss, 9 Ohio Dec.

torney, pro rata, upon such claim, and the amounts, when due, of such claim or estimates as have been meanwhile filed by other subcontractors, material men, laborers, mechanics or persons furnishing materials, and assented to or adjusted as provided for in this chapter, before the first of such subsequent payments falls due, or within ten days thereafter; but claims in favor of laborers, mechanics, and persons furnishing material to a contractor, shall be paid before the claims of subcontractors, and those of subcontractors before the principal contractor.¹

The owner is not only bound to retain payments in his hand within the time fixed but he must also furnish the principal contractor or a subcontractor, against whose fund the claim is asserted, a copy of the claim or demand which has been given to him under section 3193.² And then if such contractor or subcontractor does not dispute the claim, by giving a notice to that effect in writing to the owner, the owner may make the payment to the claimant, being careful, however, as to the rights of intervening claimant.

§ 93. Notice to head contractor—Priority of liens—Ohio statute.—Under a previous statute, it was held, that the subcontractor who first filed his claim, was entitled to priority. This statute curtails that right, and gives all who come within the ten days' limit, a right to pro rate.³ If subcontractors file claims after the ten day limit, and there still remains a balance due the head contractor, such subcontractor will be entitled to his claim.⁴ The above section recognizes the doctrine that any person who stands in the relation of principal contractor to one under him, should be subordinated in payment to such person employed under him.

302. For payment by collusion, St. 398; *Dunn v. Rankin*, 27 Ohio St. 132.
or fraud, see § 69.

¹ 97 Ohio Laws, 502.

² See § 59.

³ *Copeland v. Manton*, 22 Ohio

⁴ *Hayden Saddlery Hardware Co. v. Slade*, 3 Ohio C. C. 67, 2 Ohio Cir. Dec. 38; see § 147.

§ 94. Claim or statement—Time within which to be filed.—

The statutes are not uniform, and this is true of the holdings of the courts in the construction of the various statutes, as to the time within which the statement should be filed, but the statutory provision in reference thereto must be complied with, or there is no lien.¹ And this being regarded as a substantial part of the lien law, it has been held that it must be strictly construed.² If the statute allows a certain length of time in which the statement may be filed, the motive of the claimant taking the entire length allowed by statute, cannot be questioned.³ When the lien is to be filed within a certain time, either on the day on which the last work is done, or when the debt accrues, time is computed by excluding the last day on which the claim may be filed,⁴ and if the last day for filing falls on Sunday, it has

¹ **California.**—Ward v. Crane, 118 Cal. 676, 50 Pac. 839; Rockell v. Light, 6 Cal. App. 563, 92 Pac. 649.

Connecticut. — Shattuck v. Beardsley, 46 Conn. 386.

Delaware.—Carswell v. Patzowski, 3 Pen. (Del.) 593, 55 Atl. 1013.

Indiana.—Alexandria Bldg. Co. v. McHugh, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80.

Maine.—Foss v. Desjardins, 98 Me. 539, 57 Atl. 881; Billings v. Martin (Me.), 10 Atl. 445.

Minnesota.—Lundell v. Ahlman, 53 Minn. 57, 54 N. W. 936.

Missouri.—Stebed v. Stock, 31 Mo. 456.

New York.—Collins v. Drew, 67 N. Y. 149; Chase v. James, 10 Hun (N. Y.) 506.

Ohio.—St. Clair Bldg. Ass'n v. Hayes, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456.

Pennsylvania.—Russell v. Bell, 44 Pa. 47; appeal of Bolton, 3

Grant Cas. (Pa.) 204; in re Quickel's Estate, 11 York Leg. Rec. (Pa.) 150.

Utah.—Eclipse Steam Mfg. Co. v. Nichols, 1 Utah, 252. "Finished on or about" when used in act, sufficient. Holden v. Bright Prospects Gold Mining and Development Co., 6 Brit. Col. L. R. 439.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 132.

² Ludwig v. Huverstuhl, 108 Ill. App. 461. Cannot be extended in new contract. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho 662, 93 Pac. 765.

³ Bohn-Sash & Door Co. v. Case, 42 Neb. 281, 60 N. W. 576.

⁴ **California.**—Santa Monica Lumber and Mill Co. v. Hege, 119 Cal. 376, 51 Pac. 555.

Oregon.—Curtis v. Sestanovich, 26 Ore. 107, 37 Pac. 67.

United States.—In re Martin, 4 Fed. 208.

Washington.—Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001.

been held that it should be filed the previous Saturday.⁵ In the absence of statute, however, some courts have held that the first day on which an act can be done, must be counted and therefore where work was done on August 6th, the statute providing that the claim should be filed within nine months, May 6th following was one day too late.⁶ Neither the transfer,⁷ nor the incumbrance of the property,⁸ nor placing the same in the hands of a receiver,⁹ nor agreement of parties, (as to third persons),¹⁰ nor death of the owner, where the contract has been or is being performed, and where the statute has been otherwise complied with,¹¹ will affect the time within which the lien should be filed. Likewise a change in the personnel of the contracting firm will not change the time limit.¹² Under some statutes it is decided that the time for filing the claim begins to run when the debt is due.¹³ It then becomes material to determine when the indebtedness accrues or becomes due, and this has generally been held to be the time when, under the contract, the obligation has become com-

Wisconsin.—*Cuer v. Ross*, 49 Wis. 652, 6 N. W. 331. From date of architects' certificate—*Shields v. Sorg*, 129 Ill. App. 266, judgment affirmed; *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181.

The lapse of a day between the date and the filing of an affidavit and claim of lien, under Mechanics' Lien Act, 5, will not invalidate the affidavit and claim. *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386.

⁵ *Patrick v. Faulke*, 45 Mo. 312.

⁶ *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850.

⁷ *Gale v. Blaikie*, 126 Mass. 274; *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762; *Marryatt v. Riley*, 2 Abb. N. C. (N. Y.) 119.

⁸ *Thompson v. Spencer*, 95 Iowa 265, 63 N. W. 695; *Gilbert v.*

Tharp, 72 Iowa 714, 32 N. W. 24.

⁹ *Filer & Stowell Co. v. Empire Lumber Co.*, 91 Ga. 657, 18 S. W. 359.

¹⁰ *Brown v. Moore*, 26 Ill. 421, 79 Am. Dec. 383.

¹¹ *Welthoff v. Murray*, 76 Cal. 508, 18 Pac. 435.

¹² Retirement of partner.—*Brown v. School Dist.*, 48 Kan. 709, 29 Pac. 1069. Death of partner.—*Miller v. Hoffman*, 26 Mo. App. 199. Contract by member of firm, in his own name. *Van Horn v. Van Dyke*, 96 Wis. 30, 70 N. W. 1067.

¹³ *Schroth v. Black*, 50 Ill. App. 168; *Sullivan v. Brewster*, 1 E. D. Smith (N. Y.) 681; *Johnson v. White (Tex.)*, 27 S. W. 174; *Joseph N. Elsendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22.

pleted.¹⁴ If no time is fixed in the contract, the obligation for materials will run from the time they were delivered, and for work, when it is done.¹⁵ Where material is delivered at different times as needed,—in the absence of special contract,—the indebtedness accrues at the date of the delivery of the last

¹⁴ *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318; *Great Western Mfg. Co. v. Burns*, 59 Mo. App. 391, 1 Mo. App. Rep'r, 52. Material for which a lien on land is claimed, held to have been "furnished" on the date of its arrival at the station of destination, and the payment of freight, though, at the request of the consignee, it remained at the station several days thereafter. *Buchanan v. Selden*, 43 Neb. 559, 61 N. W. 732. Defendant, who had a contract to do certain work, half of the price to be paid when the materials were shipped, and the balance on completion of the work, subcontracted with plaintiffs for part of the work. Plaintiffs were to be paid when defendant should receive payment under its contract. Plaintiffs' claim was due on completion of the subcontract, so as to entitle them to file their lien then, though it was not payable until defendant had fully performed. *Ringle v. Wallis Iron Works*, 4 Misc. (N. Y.) 15, 24 N. Y. Supp. 757; *Hinkley v. Grafton Hall*, 101 Wis. 699, 76 N. W. 1093; *Big Horn Lumber Co. v. Davis*, 14 Wyo. 455, 84 Pac. 900, rehearing denied, 85 Pac. 1048.

¹⁵ *Robinson v. Marney*, 5 Blackf. (Ind.) 329; *Clark v. Anderson*, 88 Minn. 200, 92 N. W. 964. Under a contract to make certain machinery and deliver it "free on board of cars" at a designated place, for a stipulated sum, the machinery is furnished, within the meaning of our mechanics' lien law, when it is delivered in accordance with the contract, on board the cars at the place named, without expense to the purchaser; and, to obtain a lien therefor, the claim for a lien must be filed within four months from that time. *Congdon v. Kendall*, 53 Neb. 282, 73 N. W. 659; *Collins v. Drew*, 50 How. Pr. (N. Y.) 477. Rev. St. Ohio 3185, gives a lien for machinery furnished in the construction of a factory on filing an affidavit within four months from the time of furnishing it. Held, that under a contract to make certain machinery and furnish it "f. o. b. cars" at a designated place, for a stipulated price, the machinery was furnished, within the meaning of the statute, when it was delivered on board the cars at the place named, without expense to the purchaser, and, in order to obtain a lien therefor, it was necessary to file an affidavit within four months from that time. *King v. Cleveland*

item.¹⁶ But the different deliveries must appear to constitute parts of one transaction, the determination of which is a question of fact for the jury.¹⁷ It will be sufficient to date from the last item, even though all of such item did not enter into the construction of the building.¹⁸ If the articles were purchased on credit, then the date for filing will be the expiration of the time of credit.¹⁹ Some statutes provide, and the courts have held in other cases, that the taking of a note does not necessarily prevent the filing of the claim within the time limit.²⁰ The time cannot be extended by a secret arrangement, especially if the rights of third persons are affected.²¹ If the contract provides for the exchange of material, and no one is misled, the lien will be in time, if within the time limit from the delivery of the article in exchange,²² but if material is exchanged to supply the place of defective or broken material before furnished, this does not change the time of filing to the date of delivery of the exchanged article.²³ Increasing wages, will not constitute a new contract so as to extend the time limit

Shipbuilding Co., 50 Ohio St. 320, 34 N. E. 436; *Philadelphia v. Slonaker*, 6 Phila. (Pa.) 48; *Hooven, Owens & Rentschler Co. v. Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229; *Morrison v. Carey-Lombard Co.*, 9 Utah 70, 33 Pac. 238. The lien dates from the time of delivering materials. *Hall v. Hagg*, 20 Ont. 13.

¹⁶ *Board of Education v. Gellno*, 9 Kan. App. 555, 58 Pac. 277; *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318; *Miller v. Whitelaw*, 28 Mo. App. 639; *Baxter Lumber Co. v. Nickell*, 24 Tex. Civ. App. 519, 60 S. W. 450; *Matthews v. Waggenhaeuser Brewing Ass'n*, 83 Tex. 604, 19 S. W. 150.

¹⁷ *Nye & Schneider Co. v. Berger*, 52 Neb. 758, 73 N. W. 274.

¹⁸ *Schulenburg & Co., Lumber Co. v. Strimple*, 33 Mo. App. 154.

¹⁹ *Goble v. Gale*, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219; *Lazzari v. Havens*, 39 Misc. (N. Y.) 255, 79 N. Y. Supp. 395; *In re Hill's Estate*, 2 Clark. (Pa.) 96, 3 Pa. Law. J. (Pa.) 323.

²⁰ *Dawson v. Black*, 148 Ill. 484, 36 N. E. 413.

²¹ *Huck v. Gaylord*, 50 Tex. 578.

²² *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695.

²³ *R. J. Schwab & Sons Co. v. Frieze*, 107 Mo. App. 553, 81 S. W. 1174; *Brown & Haywood Co. v. Trane*, 98 Wis. 1, 73 N. W. 561.

for filing,²⁴ neither will the fact that there is nothing due a contractor at the time a statement should be filed by a subcontractor affect the time limit.²⁵ If filed in time the failure of the officer with whom filed to indorse it, will not affect the validity of the lien statement.²⁶

§ 95. Claim or statement—Filing on completion of building.—Where no provision is made for determining the date when the time would expire for filing the claim or statement on work done for a fixed sum under an entire contract, it will ordinarily be presumed to be when all the work required by the contract is finished,¹ that is, upon the completion of the job or building.² The parties as between themselves, may, however, agree that the building is completed before it actually is in fact and this will control,³ provided third persons are not injured by the arrangement.⁴ The building or work is generally completed when the principal contractor has finished the building or part

²⁴ *Kasper v. St. Louis Terminal R. Co.*, 101 Mo. App. 323, 74 S. W. 145.

²⁵ *Clark v. Anderson*, 88 Minn. 200, 92 N. W. 964; *Rinaker v. Freeman*, 84 Ill. App. 283.

²⁶ *Red River Lumber Co. v. Friel*, 7 N. Dak. 46, 73 N. W. 203.

¹ See generally, *Edwards v. Derrickson*, 4 Dutch. (N. J. L.) 39; *Mathiasen v. Barken*, 62 App. Div. (N. Y.) 614, 70 N. Y. Supp. 770; *McGraw v. Godfrey*, 16 Abb. Pr. (N. S.) (N. Y.) 358; *Appeal of Bolton*, 3 Grant's Cas. (Pa.) 204. If determined by occupation of the premises by the owner, the occupation must be inconsistent with the continuance by the contractor of the contract. *Orlandi v. Gray*, 125 Cal. 372, 58 Pac. 15; *Loudon v. Coleman*, 62 Ga. 146.

Split Demands.—A workman who undertakes to perform an entire contract cannot enforce a lien for each week's wages. He has no power to split up an entire demand, and maintain several suits, and enforce several liens. *Thomas v. Illinois Industrial University*, 71 Ill. 310; see § 49 and Dec. & Am. Dig. tit. Mechanics' Liens, § 132.

² *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318; *Derrickson v. Edwards*, 5 Dutch. (N. J. L.) 468, 80 Am. Dec. 220.

³ *Franklin St. Church v. Davis*, 85 Va. 193, 7 S. E. 245.

⁴ *Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146.

of building that he was under contract to build.⁵ Where the statute makes the date of the completion of the building the time from which the date of filing the lien is determined, a statement filed before that time will be void.⁶ The time of completion is determined by reference to the original contract and the action of the parties in relation thereto.⁷ In Nevada where the parties have a direct lien, claims filed before the completion of the building have been upheld and other states by statute have permitted the same thing to be done.⁸ Others allow the claimant to file the statement within a fixed time after he ceases to furnish material.⁹ The time when the building should be completed according to contract ought not to be extended by unreasonable delay.¹⁰ But if the delay is by request or fault of the owner he cannot complain.¹¹ The mere

⁵ *Malone v. Ziellian*, 1 Marv. (Del.) 285, 40 Atl. 944; *Phoenix Iron Co. v. The Richmond*, 6 Mackey (D. C.) 180.

⁶ *California*.—*Davis v. MacDonough*, 109 Cal. 547, 42 Pac. 450; *Willamette Steam Mills, &c., Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Royslance v. San Luis Hotel Co.*, 74 Cal. 273, 15 Pac. 777; *Perry v. Brainard* (Cal.), 8 Pac. 882.

Colorado.—*Tabor-Pierce Lumber Co. v. International Trust Co.* (Colo.), 75 Pac. 150.

Delaware.—*Mulrine v. Washington Lodge*, 6 Houst. (Del.) 350.

Illinois.—*Richardson v. Central Lumber Co.*, 112 Ill. App. 160.

Indiana.—*Crawfordsville v. Brundage*, 57 Ind. 262.

Kansas.—*Higley v. Ringle*, 57 Kan. 222, 45 Pac. 619; *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770, 39 Pac. 694; *Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. 89;

Davis v. Bullard, 32 Kan. 234, 4 Pac. 75; *Conroy v. Perry*, 26 Kan. 472.

Federal.—*Catlin v. Douglass*, 33 Fed. 569.

⁷ *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. 235; *Whitcomb v. Roll*, 40 Ind. App. 119, 81 N. E. 106.

⁸ *Hunter v. Truckee Lodge*, 14 Nev. 24; *Heinlein v. Murphy*, 3 Misc. (N. Y.) 47, 22 N. Y. Supp. 713; *Guillfoyle v. MacIntyre*, 11 Montg. Co. L. Rep'r (Pa.) 12.

⁹ *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375, 67 N. E. 321; *Fitch v. Howitt*, 32 Ore. 396, 52 Pac. 192.

¹⁰ Where to accommodate tenants, a little work requiring only three hours to perform was left to be done later, the time dated from the time that it should have been finished. *Flint v. Raymond*, 41 Conn. 510.

¹¹ *McIntyre v. Trautner*, 63 Cal. 429 (defendant would not ac-

fact that the time limit within which a lien could ordinarily be filed has elapsed, will not of itself be considered unreasonable.¹² But if the contractor does work after the time when the contract ought to be completed for the sole purpose of extending the time, then the delay is unreasonable and will defeat his right.¹³

§ 96. Claim or statement—Filing on completion of building—continued.—Where the fact of the completion of the building determines the date of filing a lien statement, such fact is determined like other questions of fact on the trial.¹ If it is substantially done according to contract,² and the owner con-

cept work); *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332; *Flint v. Raymond*, 41 Conn. 510. Plaintiff built a steam power plant for defendant under a contract providing that final settlement therefor should be made 30 days after the machinery was started. That event occurred June 29th, but at defendant's request plaintiff continued in charge of the plant, operating the same until August 1st, during which time, at defendant's request he furnished extra material and did extra work, the last on July 29th. A sworn statement of the work done and the material furnished, filed by plaintiff August 13th, to secure a mechanics' lien, was filed within 30 days after the work was performed and materials furnished within Act Ohio, March 20, 1889 (86 Ohio Laws, p. 128) § 2, relating to mechanics' liens. *New England Engineering Co. v. Oakwood St. R. Co.*, 75 Fed. 162.

¹² *Billings Co. v. Brand*, 187 Mass. 417, 73 N. E. 637.

¹³ *O'Driscoll v. Bradford*, 171 Mass. 231, 50 N. E. 628.

¹ *First Presbyterian Church v. Santy*, 52 Kan. 462, 34 Pac. 974. The occupation of a church with pews in it is not necessarily an acceptance of the work. *Wood v. Stringer*, 20 Ont. R. 148. Whether a building was completed or not, on a given date within the meaning of the mechanic's lien law, so as to affect the rights of lienors will be determined by what common intelligence and common usage regard as completion, always, however, with reference to the building contract. *Reggs Inc. Co. v. Shedd*, 16 App. D. C. 150.

² *Joralman v. McPhee*, 31 Colo. 26, 71 Pac. 419; *Hartley v. Richardson*, 40 Atl. 336, 91 Me. 424; *Shaw v. Fjellman*, 72 Minn. 465, 75 N. W. 705; see § 49, *Performance of Contract*.

siders it finished,³ although there are minor details,⁴ such as grading the lot,⁵ or fixing floors, door steps, mantels, etc., worth \$75.00, out of a contract price of \$1,665,⁶ or but seven or eight hours' work remain to be done, the building may be considered as completed.⁷ But if there are a large number of things to be done, the building cannot be considered as completed until they are performed.⁸ The fact that the contract was void by reason of not being recorded as the statute required, will not prevent its use for the purpose of showing when the building ought to have been completed.⁹ The acts of the parties and the condition of the building itself may be considered on the question of the completion of the work.¹⁰ Where the lien statement is not required to state the time of the completion of the work the claimant will not be bound by a recital therein of the date of completion, unless it was made

³ *Minneapolis Trust Co. v. Great Northern R. Co.*, 81 Minn. 28, 83 N. W. 463; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060; *Stewart v. McQuaide*, 48 Pa. St. 191. However, as to third persons, the owners' conduct will not control. *Lichty v. Houston Lumber Co.*, 39 Colo. 53, 88 Pac. 846.

⁴ *Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 51 Pac. 555.

⁵ *Rice v. Brown*, 1 Kan. App. 646, 42 Pac. 396.

⁶ *McMechan v. Baker*, 11 N. Y. Supp. 781.

⁷ *Genest v. Las Vegas Masonic Bldg. Ass'n*, 11 N. M. 251, 67 Pac. 743.

⁸ *Buell & Co. v. Brown*, 131 Cal. 158, 63 Pac. 167. Unless abandoned by owner. *Marchant*

v. Hayes, 120 Cal. 137, 52 Pac. 154; *Schallert-Ganahl Lumber Co. v. Sheldon* (Cal.), 32 Pac. 235. A building is not completed, within the mechanic's lien law, so as to affect the rights of lienors, where there was a down spout to be placed on the front, iron shelves to be placed in the vaults, a broken plate-glass window to be replaced, alterations in the marble work on the front of the building, and gas fixtures to be hung, all of which were required by the contract. *Riggs Fire Ins. Co. v. Shedd*, 16 App. (D. C.) 150.

⁹ *Barker v. Doherty*, 97 Cal. 10, 31 Pac. 1117.

¹⁰ *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318.

with a fraudulent intent.¹¹ If the contract makes completion depend on the certificate of an architect,¹² or of a superintendent,¹³ or other authority, such certificate will conclusively determine that fact.¹⁴

§ 97. Claim or statement—Items to renew period for filing.—

When the time has once arrived for the filing of the statement, be it by completion of the building, the delivery or furnishing of material, performance of work, the maturity of the claim or accrual of indebtedness, the time limit cannot be changed or extended by materials furnished thereafter or work thereafter performed.¹ If an item furnished is part of the

¹¹ *Burleigh Bldg. Co. v. Merchant Brick, & Co.*, 13 Colo. App. 455, 59 Pac. 83; *Eller v. Cambridge Springs Co.*, 18 Pa. Super. Ct. 44.

¹² *McLaughlin v. Perkins*, 102 Cal. 502, 36 Pac. 839; *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728; *Washington Bridge Co. v. Land & River Imp. Co. of Everett*, 12 Wash. 272, 40 Pac. 982; *Bentley v. Adams*, 92 Wis. 386, 66 N. W. 505.

¹³ *Beatty v. Mills*, 113 Cal. 312, 45 Pac. 468.

¹⁴ *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318; *Bruns v. Braun*, 35 Mo. App. 337; *Smith v. New York*, 32 Misc. (N. Y.) 380, 66 N. Y. S. 686; *Franklin Bank v. Cincinnati*, 10 Ohio Dec. 545.

¹ *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896. Frame in cellar. *Lippert v. Lasar (Cal.)*, 33 Pac. 797. \$7.00 worth of work on \$4,700 job. *Santa Clara Valley Mill & Lumber Co. v. Williams*, 97 Cal. 318, 31 Pac. 1128. Two

bolts delivered 60 days after building was finished. *Barrows v. Knight*, 55 Cal. 155; *Burleigh Bldg. Co. v. Merchant Brick & Building Co.*, 13 Colo. App. 455, 59 Pac. 83. House finished April 7, a few hours' work Sept. 27. *Sanford v. Frost*, 41 Conn. 617. A few hours' painting on porch. *Flint v. Raymond*, 41 Conn. 510. Gas fixtures and electric bells. *Brown v. Waring*, 1 App. (D. C.) 378. Supplying an omission. *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Hassenfus v. Philadelphia Packing, etc., Co.*, 15 Pa. Co. Ct. R. 650, 4 Dist. R. (Pa.) 57. Putting on hasps, adding screws, one hour's work. *Woodruff v. Hovey*, 91 Me. 116, 39 Atl. 469. Friendly acts of accommodation. *Cole v. Clark*, 85 Me. 336, 27 Atl. 186, 21 L. R. A. 714; *Miller v. Wilkinson*, 167 Mass. 136, 44 N. E. 1083. Two hours' work, three and one-half months after apparent completion. *Dayton v. Minneapolis Radiator & Iron Co.*, 63 Minn. 48, 65 N. W. 133. Articles exchanged. John-

original contract, the furnishing of that item may, even though the contract was partly completed, extend the time.² As between original parties, where items are furnished after the building is completed under an original contract, the time limit

son v. Gold, 32 Minn. 535, 21 N. W. 719. Where the work on a building is substantially completed, and the contractor tenders the same as complete, and it is so accepted by the owner, the contractor cannot afterwards, against the will of the owner, perform some part that was called for in the contract, but which has been omitted in the construction, and thereby extend the statutory period after the completion of the work within which a mechanic's lien must be filed. General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318. Minor details done after acceptance of building, on promise then made by contractor to do same. General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318. Out house, not erected under contract for main building. Krah v. Weidlich, 55 Mo. App. 536. Putting weather strips on window. Scott v. Cook, 8 Mo. App. 193. Work done to complete work made necessary by general contractor. Hayden Slate Co. v. Anderson, 76 Mo. App. 281. Furnishing gratuitous articles. Congdon v. Kendall, 53 Neb. 282, 73 N. W. 659. Oiling top floor. Steuerwald v. Gill, 83 N. Y. Supp. 396, 85 App. Div. 605. Work done as a mere pretext, to

extend time. Kelly v. William J. Merritt Co., 68 N. Y. Supp. 774; Duffy v. Baker, 17 Abb. N. Cas. (N. Y.) 357; McLean v. Sanford, 26 App. Div. (N. Y.) 603, 51 N. Y. Supp. 678. Work done to repair that destroyed by acts of others. Fay v. Muhler, 1 Misc. (N. Y.) 321, 20 N. Y. Supp. 671. A glass tube in a fire extinguisher. King v. Cleveland Shipbuilding Co., 50 Ohio St. 320, 34 N. E. 436; General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 165 Mo. 171, 65 S. W. 318. Work to replace defective. Harrison v. Women's Homeopathic Hospital Ass'n, 134 Pa. St. 558, 19 Atl. 804, 26 W. N. C. 84; Women's Homeopathic Ass'n v. Harrison, 120 Pa. St. 28, 13 Atl. 501; Berry v. Turner, 45 Wis. 105; Summers v. Beard, 24 Ont. R. 641; Avery v. Butler, 30 Ore. 287, 47 Pac. 706. Repairing leak in roof. Dunn v. McKee, 37 Tenn. 657; Cahoon v. Fortune Min. & Mill Co., 26 Utah 86, 72 Pac. 437. Water pan. Home Brewing Co. v. Johnson (Ind. App.), 83 N. E. 358. Forty cents worth of material. Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. 24.

² California.—Coss v. MacDonough, 111 Cal. 662, 44 Pac. 325.

Connecticut.—Nichols v. Culver, 51 Conn. 177.

Massachusetts.—Hubbard v.

may be extended from date of said last item.⁴ If the building is in fact completed, but the owner will not accept the same until some item is furnished, then the building will not be considered completed until the time such item is furnished.⁵ The fact that the material was not in fact used, if the party believed and had a right to believe that it was used, he would have a right to file his lien dating from the time such material was delivered.⁶ The principal contractor cannot extend the time for the material man by ordering material after time has begun to run.⁷ If a lien will not cover all the items therein set forth because all are not within the time limit, it will be good as to those which are within the time limit,⁸ and if no time is fixed for delivery, the claimant may choose his time.⁹ The abandonment of an improvement is generally considered as fixing the rights of the parties at that date, so far as the time

Brown, 8 Allen (Mass.) 590; Turner v. Wentworth, 119 Mass. 459.

Michigan.—Smalley v. Gearing, 121 Mich. 190, 206, 79 N. W. 1114.

Missouri.—Bruce v. Berg, 8 Mo. App. 204.

New York.—Fay v. Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Supp. 671; Duffy v. Baker, 17 Abb. N. Cas. (N. Y.) 357. Under Rev. St. 3185, providing that to obtain a mechanic's lien an affidavit shall be filed within a certain time from the performing of the labor or furnishing of the material, where a contract to slate a roof is entire, and it is a uniform rule and custom that such contract includes the repairing of the slating necessitated by the subsequent work on the building during its construction, the time during which a lien for the slating may be taken, runs from the

completion of the repairs. Bernsdorf v. Hartway, 7 Ohio Cir. Ct. 378.

⁴ Farnham v. Richardson, 91 Me. 559, 40 Atl. 553; McKelvey v. Jarvis, 87 Pa. St. 414; Appeal of Parrish, 83 Pa. St. 111; Johns v. Bolton, 12 Pa. St. 339.

⁵ Minneapolis Trust Co. v. Great Northern R. Co., 74 Minn. 30, 76 N. W. 953.

⁶ John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718.

⁷ Sulzer-Vogt Mach. Co. v. Rushville Water Co., 160 Ind. 202, 65 N. E. 583; Trueblood v. Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

⁸ Powell v. Nolan, 27 Wash. 318, 67 Pac. 712; Steeves v. Sinclair, 171 N. Y. 676, 64 N. E. 1125; Kenyon v. Peckham, 10 R. I. 402.

⁹ Burrell v. Way, 176 Mass. 164, 57 N. E. 335.

for filing a statement may be concerned.¹⁰ The fact that the owner was protected by a contractor's bond does not affect this matter.¹¹ Under some statutes it is held that the actual cessation of the work,¹² or termination of the same by the act of the owner, when brought to the knowledge of the claimant, will fix that as the time of the termination of the contract, and the date by which the filing of the statement will be governed.¹³

§ 98. Claim or statement—effect of successive deliveries on time for filing.—It is sometimes a matter of considerable difficulty to determine the time for filing a lien or statement where the work is done or materials furnished at successive times. Generally where the work is done or the materials furnished at different times under a continuing contract, they are considered as done or furnished under one contract,¹ and the time begins to run from the last act done in the execution of the

¹⁰ *Johnson v. LaGrave*, 102 Cal. 324, 36 Pac. 651; *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648; *Catlin v. Douglass*, 33 Fed. 569.

¹¹ *Shaw v. Stewart*, 43 Kan. 572, 23 Pac. 616.

¹² *Colorado*.—*Perkins v. Boyd*, 37 Colo. 265, 86 Pac. 1045.

Kansas.—*Main Street Hotel Co. v. Horton Hardware Co.*, 56 Kan. 448, 43 Pac. 769; *Chicago Lumber Co. v. Merrimack River Sav. Bank*, 52 Kan. 410, 34 Pac. 1045.

Minnesota.—*McCarthy v. Groff*, 48 Minn. 325, 51 N. W. 218; *Ponder v. Safety Building & Loan Co.*, 22 Ky. L. 1074, 59 S. W. 523.

¹³ *Pedretti v. Stichenoth*, 6 Ohio Cir. Ct. R. 516; *McEwen v. Union Bank & Trust Co.*, 35 Mont. 470, 90 Pac. 359. A subcontractor, who was informed several

months before by the contractors that they had had trouble with the architect, and who knew that the work had been abandoned, and the house boarded up, is put on inquiry as to whether the contract with the owner was abandoned, so that, it having been abandoned, his work thereafter performed can not be considered done under his contract with the contractors, for the purpose of determining the time for filing his lien. *Naughton Slate Co. v. Nicholson*, 97 Mo. App. 332, 71 S. W. 64;

¹ **Maryland.**—*Okisko Co. v. Matthews*, 3 Md. 168.

Michigan.—*Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545, 8 Det. Leg. N. 278.

Minnesota.—*State Sash & Door Mfg. Co. v. Norwegian-Danish Evangelical Lutheran Augsburg*

contract.² As to what will constitute a running or continuous contract, is a matter of some difficulty. Instances of what have been held such contracts are given in the note.³ The

Seminary, 45 Minn. 254, 47 N. W. 796.

Missouri.—Walden v. Robertson, 120 Mo. 38, 25 S. W. 349; Fulton Iron Works v. North Centre Creek Min. & Smelting Co., 80 Mo. 265; Squires v. Fithian, 27 Mo. 134.

Nebraska.—Nye & Schneider Co. v. Berger, 52 Neb. 758, 73 N. W. 274.

New York.—Spencer v. Barnett, 35 N. Y. 94; Haden v. Buddensiek, 6 Daly (N. Y.) 3.

Pennsylvania.—Croskey v. Corryell, 2 Whart. (Pa.) 223.

Wisconsin.—Dorestan v. Kreig, 66 Wis. 604, 29 N. W. 576. Separate contracts cannot be tacked. Valley Lumber & Mfg. Co. v. Driessell, 13 Idaho 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299n.

² **Alabama.**—Lane & Bodley Co. v. Jones, 79 Ala. 156.

Idaho.—Valley Lumber & Mfg. Co. v. Driessell, 13 Idaho 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299n.

Kansas.—Great Spirit Springs Co. v. Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714.

Louisiana.—Brashear v. Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 240.

Missouri.—Schmieding v. Ewing, 57 Mo. 78; Darlington Lumber Co. v. Harris, 107 Mo. App. 148, 80 S. W. 688; Heltzell v. Chicago, &c., R. Co., 20 Mo. App. 435.

Pennsylvania. — Bartlett v.

Kingan, 19 Pa. St. 341; Brick Co. v. Norton, 2 Pa. Dist. 559; In re Hill's Estate, 2 Clark (Pa.) 96, 3 Pa. L. J. 323; Geiss v. Rapp. 1 Walker (Pa.) 111, 14 Leg. Int. (Pa.) 116.

Tennessee. — Bristol Brick Works v. King College (Tenn.) Ch. App., 41 S. W. 1069.

Virginia. — Osborn v. Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446.

³ Ballou v. Black, 17 Neb. 389, 23 N. W. 3. A lumber dealer was furnishing lumber for a building in the course of erection under contract. The contractor applied at the lumber yard for certain pieces of lumber, stating that the immediate purpose for which he wanted them was to prop up the brick walls; that he might use them in the erection of the building; that if he did not use them in building he would return them; that if he did use them he would notify the lumberman, so that he might charge them up. Four days after the delivery of the last material for said building by the lumber dealer other than the pieces of lumber in question, the contractor applied at the office of the dealer, told him that he had used the said pieces of lumber in the building, and to charge them up. Held that, for the purpose of the mechanic's lien law, the said pieces of lumber were furnished at the

question whether the contract is a single or continuing con-

date of the notification of the lumber dealer by the contractor that he had used them in the building and to charge them up. *Marble v. Jones, &c., Lumber Co.*, 19 Neb. 732, 28 N. W. 309. Where a contractor entered into an agreement with a material man whereby the latter was to furnish all the material of a certain kind for a building without any specific quantity being designated, and such material is delivered to the contractor from time to time, the time for filing a lien claim commences to run from the last delivery. *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797. A running account for materials furnished for the same general purpose is deemed an entire contract. Each item is not to be regarded as a separate cause of action, but the whole rather as a continuous dealing, the aggregate of the items being included in the same cause of action for which one lien is given. *Frankoviz v. Smith*, 34 Minn. 403, 26 N. W. 225; see also, *Skyrme v. Occidental Mill Co.*, 8 Nev. 219; *Lamb v. Hanneman*, 40 Iowa 41; *Schmeiding v. Ewing*, 57 Mo. 78; *O'Leary v. Burns*, 53 Miss. 171.

Separate Orders.—If the materials were furnished in pursuance of a single continuing contract, such as to furnish material for a building about to be erected or in process of construction, the period within which the statement must be filed with the judge of probate commences to run from the delivery of the last

items. But, if the materials were furnished under separate orders or requests, in pursuance of a general agreement or understanding to furnish such materials as may be needed from time to time, for repairing or replacing machinery in the mill as ordered, then each order or request is a separate contract, and the statement must be filed within the time limited after delivery upon each order. *Lane & Bodley Co. v. Jones*, 79 Ala. 156. Where a contract is made for material to be delivered from time to time, as required in the repairs of buildings, and the material in accordance therewith is furnished as orders therefor are received, each order is not an independent contract, so as to require a separate lien to be filed within the required time after the delivery of each order. *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876.

Balance Struck.—The lumber dealer at the end of the first year struck a balance and carried it on to the next. No lumber was called for from October 31st of the first year till July 20th of the second, when the lessee came to see the lumber dealer in relation to it. Held, no evidence of two distinct contracts. *Haines v. Chandler*, 26 Ill. App. 400. Mere knowledge that a building is being built, and the supplying of orders for suitable materials, will not constitute a "continuing" or "entire" contract, within the meaning of the mechanic's

tract is one of fact for the jury.⁴ In order to constitute a continuing contract, it is not necessary for the amount of work or materials to be determined at the time of the first order,⁵ nor that the price be agreed upon,⁶ nor the time of payment settled.⁷ If there is a hiatus between the items sufficient to permit the filing of a lien, the claimant relying on a continuing contract must prove that fact. There is no presumption that all the materials were furnished under one contract.⁸ The affidavit attached to the lien does not determine the question as to whether or not the contract is a continuous contract.⁹ In cases where the length of time between the furnishing of different articles extends beyond the time limit,¹⁰ and the contract is not entire, a separate statement should be filed for liens or materials furnished, and work done within each separate time limit.¹¹ The fact that monthly statements were rendered and miscellaneous payments made, will not prevent the contract from being a continuous one.¹² As a general rule it may be

lien law. *Stone v. Juvinall*, 125 Ill. App. 562. See generally *Maryland Brick Co. v. Dunkerly*, 85 Md. 199, 36 Atl. 761; *Robock v. Peters*, 13 Manitoba 124.

⁴ *Helena Steam-Heating & Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Nye & Schneider Co. v. Berger* 52 Neb. 758, 73 N. W. 274.

⁵ *Maryland*.—*Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

Minnesota.—*Couglan v. Longini*, 77 Minn. 514, 80 N. W. 695 extras included; *St. Paul Pressed Brick Co. v. Stout*, 45 Minn. 327, 47 N. W. 974.

Pennsylvania.—*Diller v. Burger*, 68 Pa. St. 432.

South Dakota.—*Albright v. Smith*, 2 S. Dak. 577, 51 N. W. 590.

Wisconsin.—*Chapman v. Wadleigh*, 33 Wis. 267.

⁶ *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350; *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

⁷ *Patton v. Matter*, 21 Ind. App. 277, 52 N. E. 173.

⁸ *Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 80 S. W. 688; *Henry, & Co. v. Fisher-dick*, 37 Neb. 207, 55 N. W. 643.

⁹ *Henry, & Co. v. Fisher-dick*, 37 Neb. 207, 55 N. W. 643.

¹⁰ *Wilson v. Forder*, 30 Pa. St. 129.

¹¹ *Hudnit v. Roberts*, 10 Phila. (Pa.) 535, 31 Leg. Int. (Pa.) 333; *Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 80 S. W. 688.

¹² *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

stated that deliveries, even if made under separate contracts, if the work is continuous, will be considered as one and the time limit for filing will date from the last item furnished.¹³ But the contract cannot be considered continuous if an interregnum of six months intervenes between deliveries,¹⁴ nor in any case can successive deliveries under separate contracts be included in one statement, if it worked a fraud on interested parties.¹⁵ If the contracts are separate and disconnected in their performance, the time will date from the delivery made under each contract.¹⁶

¹³ **Iowa**.—Jones, &c., Lumber Co. v. Murphy, 64 Iowa 165, 19 N. W. 898.

Massachusetts. — Worthen v. Cleveland, 129 Mass. 570; Miller v. Batchelder, 117 Mass. 179.

Minnesota. — Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225.

Missouri.—Livermore v. Wright, 33 Mo. 31; Kern v. Pfaff, 44 Mo. App. 29; Kearney v. Wurdeman, 33 Mo. App. 447.

Nevada.—Capron v. Strout, 11 Nev. 304; Skyrme v. Occidental Mill & Min. Co., 8 Nev. 219.

Pennsylvania.—Smaltz v. Hagy, 4 Phila. (Pa.) 99.

¹⁴ **Gilbert v. Tharp**, 72 Iowa 714, 32 N. W. 24.

¹⁵ **Wood v. Haney** (Tenn. Ch. App.), 41 S. W. 1072.

¹⁶ **Iowa**.—Chase v. Garver Coal & Min. Co., 90 Iowa 25, 57 N. W. 648.

Maryland.—Watts v. Whittington, 48 Md. 353.

Massachusetts. — Worthen v. Cleveland, 129 Mass. 570.

Michigan.—Noye Mfg. Co. v. Thread Flouring-Mills Co., 110 Mich. 161, 67 N. W. 1108.

Minnesota.—Scheible v. Schickler, 63 Minn. 471, 65 N. W. 920.

Missouri. — Schulenburg v. Vrooman, 7 Mo. App. 133.

Nebraska.—Central Loan & Trust Co. v. O'Sullivan, 44 Neb. 834, 63 N. W. 5.

Pennsylvania. — Yearsley v. Flanigen, 22 Pa. St. 489.

Rhode Island.—Sweet v. James, 2 R. I. 270.

Washington.—Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273.

Wisconsin.—Brown v. Edward P. Allis Co., 98 Wis. 120, 73 N. W. 656.

Manitoba.—Chadwick v. Hunter, 1 Manitoba 39.

Where lumber was furnished between November 18, 1895, and the following March, and a note therefor was given on account, and a payment made thereon, and in the following May more lumber was furnished on a similar order, and used on the same building, the two transactions were separate, and a notice of lien, filed within 90 days after the furnishing of the last item, was sufficient to establish a lien as

§ 99. Claim or statement—extras—contractors and subcontractors—amendments as to time of filing.—If extra work is done or extra material furnished without special contract in the execution of the principal contract, they will be considered as part of the principal contract and the time for filing the statement will date from the day when the extras were furnished.¹ But if such extras are furnished after the principal contract has been executed in full, the time will not be extended from the date of the furnishing of such extras.² And in no case can the parties by agreement, to the injury of third persons, extend the time beyond that of the principal contract, or make a continuing one by the purchasing of additional articles.³ Some statutes make a distinction as to the time in which an original contractor and subcontractor may file their liens.⁴ Under such statutes the law must be complied with and the ordinary rules,

to the first item. *National Life Ins. Co. v. Ayres*, 111 Iowa 200, 82 N. W. 607.

¹ *Costello v. Dale*, 1 Hun (N. Y.) 489, 3 Th. & C. (N. Y.) 493. *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277. In Alabama, each order is considered a separate contract. *Lane, &c., Co. v. Jones*, 79 Ala. 156. Labor by the day, dates from each day. *Goodale v. Walsh*, 2 Th. & C. (N. Y.) 311; *Seattle, &c., R. Co. v. Ah Kow*, 2 Wash. Terr. 36, 3 Pac. 188. Appeal of *Hofer*, 116 Pa. St. 360, 9 Atl. 441; *Singerly v. Doerr*, 62 Pa. St. 9; *Brown v. Kolb*, 8 Pa. Super. Ct. 413. Must be filed in three months under the law of District of Columbia. *Caldwell v. Wind-er*, 2 Hayes & H. (D. C.) 24, 30 Fed. Cas. 18,245. See Dec. & Am. Dig. tit. Mechanics' Liens, § 132.

² *Hobkirk v. Portland Baseball*

Club, 44 Ore. 605, 76 Pac. 776; *Miller v. Heath*, 22 Pa. Super. Ct. 313.

³ *Inman v. Henderson*, 29 Ore. 116, 45 Pac. 300. A contract for an excavation on the premises of defendant provided that any additional work should become a part of it. The work was completed and paid for, when the contractor, more than six months thereafter, filed a lien for extra work already completed when the contract was settled. Held, that it was filed too late. *Cody v. White*, 34 Misc. (N. Y.) 633, 70 N. Y. Supp. 589.

⁴ *California*.—*Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294; *Sparks v. Butte County Gravel Min. Co.*, 55 Cal. 389.

Colorado.—*Hart, &c., Corp. v. Mullen*, 4 Colo. 512.

determining who is a contractor,⁵ or a subcontractor,⁶ or material man, will control.⁷ It is not an unusual thing for the statutes to require a different length of time, or impose different conditions as to time for a subcontractor under a contract with the contractor, than is applied to the contractor himself. As to what will be included in the subcontractor's contract, as a continuing one, or as to how it may be kept alive by successive deliveries, the same rules will generally be applied as to the principal contractor.⁸ It is sometimes attempted to amend claims that have not been properly filed, but this will not be permitted after the time limit has expired, where the

Delaware.—Curlett v. Aaron, 6 Houst. (Del.) 477; France v. Woolston, 4 Houst. (Del.) 557.

Idaho.—Colorado Iron Works v. Riekenberg, 4 Idaho 262, 38 Pac. 651.

Texas.—Matthews v. Wagenhaeuser Brewing Ass'n, 83 Tex. 604, 19 S. W. 150.

United States.—Salt Lake Hardware Co. v. Chainman Min. &c. Co., 128 Fed. 509.

⁵ See § 48.

⁶ See §§ 53-55.

⁷ See §§ 53-55.

Indiana.—Stephenson v. Ballard, 82 Ind. 87; Thomas v. Kiblinger, 77 Ind. 85; Hamilton v. Naylor, 72 Ind. 171.

Iowa.—Missouri River Lumber Co. v. Finance Co., 93 Iowa 640, 61 N. W. 913.

Kansas.—Higley v. Ringle, 57 Kan. 222, 45 Pac. 619; Shella-barger v. Bishop, 14 Kan. 432.

Maryland.—Heath v. Tyler, 44 Md. 312.

Massachusetts.—Kennebec Framing Co. v. Pickering, 142 Mass. 80, 7 N. E. 30; Gale v. Blakie, 129 Mass. 206.

Michigan.—Comstock v. McEvoy, 52 Mich. 324, 17 N. W. 931; Schulenburg v. Gibson, 15 Mo. 281.

Texas.—Burke v. Brown, 10 Tex. Civ. App. 298, 30 S. W. 936; Whiteselle v. Texas Loan Agency (Tex. Civ. App.), 27 S. W. 309.

⁸ See § 98.

District of Columbia.—Martin v. Campbell, 6 Mackey (D. C.) 296.

Kansas.—Groesbeck v. Barger, 1 Kan. App. 61, 41 Pac. 204; Crawford v. Blackman, 30 Kan. 527, 1 Pac. 136; Clough v. McDonald, 18 Kan. 114; Weyerhaeuser v. Fraim, 54 Kan. 645, 39 Pac. 188; Cunningham v. Barr, 45 Kan. 158, 25 Pac. 583.

Nebraska.—Drexel v. Richards, 48 Neb. 322, 67 N. W. 169; Wells v. David City Imp. Ass'n, 43 Neb. 366, 61 N. W. 623; McPhee v. Kay, 30 Neb. 62, 46 N. W. 223.

New York.—McMahon v. Hodge, 2 Misc. (N. Y.) 234, 21 N. Y. Supp. 971.

Oregon.—Ainslie v. Kohn, 16 Ore. 363, 19 Pac. 97.

South Dakota.—Albright v.

amendment is in a material part of the claim.⁹ If the statute makes some provision in reference to such amendment, the statute will control.¹⁰ The substitution of new parties as owners,¹¹ or the name of the owner,¹² or the name of the contractor,¹³ or failure to specify items, are material matters, and cannot be remedied by amendment.¹⁴ If neither the owner,¹⁵ nor third persons are affected, the amendment will be allowed.¹⁶

§ 100. **Claim or statement—form and contents.**—The statutes rarely if ever provide a form for the statement or claim used as a basis of mechanics' liens, and when the labor has once been performed or the materials furnished, the equities are then strong in favor of the maintenance of the lien, and the courts

Smith, 3 S. Dak. 631, 54 N. W. 816.

Irrespective of previous acceptance or occupancy by the owner. *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633.

Lien claimants, other than original contractors, must file their lien notices within 30 days from the completion of the work or cessation of labor thereon. *Seattle, &c. R. Co. v. Ah. Kow*, 2 Wash. Terr. 36, 3 Pac. 188.

⁹ *McGillivray v. District Tp. of Barton*, 96 Iowa 629, 65 N. W. 974; *Drake v. Green*, 48 Kan. 534, 29 Pac. 584. Where once dead, it cannot be revived. *Farnham v. Davis*, 79 Me. 282, 9 Atl. 725; *Gault v. Wittman*, 34 Md. 35; *Dearie v. Martin*, 78 Pa. St. 55; *Russell v. Bell*, 44 Pa. St. 47.

¹⁰ *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25, 65 N. W. 1017; *Knox v. Hilty*, 118 Pa. St. 430, 11 Atl. 792; *Schaeffer v. Rohrbach*, 1 Wilcox (Pa.) 250.

¹¹ *Beetem v. Treibler*, 16 Pa. Co. Ct. 695, 4 Pa. Dist. 738;

O'Neill v. Hurst, 11 Phila. (Pa.) 171, 33 Leg. Int. (Pa.) 13.

¹² *Nason Mfg. Co. v. Jefferson Medical College Hospital Trustees*, 12 Phila. (Pa.) 483.

¹³ *Horton v. Watson*, 8 Pa. Co. Ct. (Pa.) 143; *Murta v. Stephenson*, 2 Pa. Dist. (Pa.) 480.

¹⁴ *McFarland v. Schultz*, 168 Pa. St. 634, 32 Atl. 94.

¹⁵ *Dennis v. Williamson*, 2 Pa. Dist. 181.

¹⁶ *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341. The statute requires the petition to enforce a mechanic's lien to be filed within 90 days. A petition was duly filed, naming A. and B. as subcontractors. After 90 days, the petition was amended by substituting C. as contractor. Held permissible. *Newman v. Jefferson City, &c., Co.*, 19 Mo. App. 100. The addition of the name of an agent as defendant and his description in the claim as such, is mere surplusage, and may be amended under the acts

will not hold a lien invalid because the lien statement does not verbatim follow the statute¹ or from the fact that it is awkwardly and inartistically drawn,² nor will it be defeated by technicalities in relation to the manner or form in which the lien statement is made,³ the purpose of the statement being to give notice of the lienor's claim.⁴ A substantial following of the statute in relation to required statements contained in the claim is all that the courts demand,⁵ and in this respect a liberal construction is given to the statute.⁶ But the claim must show on its face all the facts necessary to create and fix the lien,⁷

of April 9, 1862, and June 11, 1879. *Harner v. Thomas*, 10 Pa. Dist. 487.

¹ *Taylor v. Wittkamp*, 13 Phila. (Pa.) 31. See Dec. & Am. Dig. tit. Mechanics' Liens, § 133.

² *Durling v. Gould*, 83 Me. 134, 21 Atl. 833; *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281; *Kelly v. Brown*, 20 Pa. St. 446.

³ *Durling v. Gould*, 83 Maine 134, 21 Atl. 833; *Ryan v. Klock*, 36 Hun (N. Y.) 104. Under statute of B. C. 1888, Cap. 74, the following were held to be fatal defects: 1. Omission to state residence of the owner. 2. Omission to sufficiently state residence of contractors. 3. Omission to state in detail the particulars and item of the work done and materials furnished. 4. Omission to state the claim due, and when it became due. Statement that it was "owing" held sufficient. *Smith v. McIntosh*, 3 Brit. Col. L. R. 26.

⁴ *Grace v. Oakland Bldg. Ass'n*, 166 Ill. 637, 46 N. E. 1102; *Badenoch v. Hoffman*, 50 Ill. App. 512; *O'Brien v. Krockinski*, 50

Ill. App. 456; *Lax v. Peterson*, 42 Minn. 214.

⁵ *California*.—*Russ Lumber, & Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747.

Illinois.—*Orr, &c., Hardware Co. v. Needham Co.*, 51 Ill. App. 57.

North Dakota.—*Red River Lumber Co. v. Friel*, 7 N. D. 46, 73 N. W. 203.

Oklahoma.—*Blanshard v. Schwartz*, 7 Okla. 23, 54 Pac. 303.

Pennsylvania.—*Russell v. Bell*, 44 Pa. St. 47; *Brown v. Myers*, 145 Pa. St. 17; *Driesbach v. Keller*, 2 Pa. St. 77.

Vermont.—*Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235.

⁶ *Durling v. Gould*, 83 Me. 134, 21 Atl. 833. With the limitation that this rule cannot be applied in so far as to entirely dispense with what the statute says the notice shall contain. *Waters v. Goldberg*, 124 App. Div. (N. Y.) 511, 108 N. Y. Supp. 992.

⁷ *Kansas*.—*Bethell v. Chicago Lumber Co.*, 39 Kan. 230, 17 Pac. 813.

Louisiana.—*Wheelwright v. St.*

and must do so without reference to other papers, which are neither attached nor incorporated.⁸ But it has been held that the claim is not defective if more is stated than is required,^{8a} or if it fails to state whether the contract was in writing or parol,^{8b} or a mistake in amount where there is no fraud perpetrated.⁹ As a general rule it is not necessary that the claim or statement should assert that a lien is claimed,¹⁰ nor that the claimant is a contractor, subcontractor or material man, unless it would be necessary to make such statement to establish the right to a lien.¹¹ Neither is it necessary that reference be made to the statute, under which the lien is claimed.¹² Under statutes which allow several claims to be stated in one statement,¹³ or where the statute allows the claim to be on contiguous lots, these statutory facts need not be stated.¹⁴ Less strictness is required between owner and contractor,¹⁵ than where the rights of third parties may intervene.¹⁶ If it fails to state

Louis, etc., Canal, &c., Co., 47 La. Ann. 533, 17 So. 133.

Pennsylvania.—Knelly v. Horwath, 208 Pa. St. 487, 57 Atl. 957; Este v. Pennsylvania R. Co., 13 Dist. (Pa.) 451; Smaltz v. Knott, 3 Grant Cas. (Pa.) 227.

Washington.—Warren v. Quade, 3 Wash. St. 750, 29 Pac. 827.

⁸ Foster v. Wulffing, 20 Mo. App. 85.

^{8a} John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718.

^{8b} Baldwin v. Spear Bros., 79 Vt. 43, 64 Atl. 235.

⁹ Turner v. St. John, 8 N. Dak. 245, 78 N. W. 340.

¹⁰ Smith v. Headley, 33 Minn. 384, 23 N. W. 550.

¹¹ Lutz v. Ey, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. (N. Y.) 475.

¹² White v. Livingston, 69 App. Div. (N. Y.) 361, 75 N. Y. Supp. 466; Hawkins v. Boyden, 25 R. I. 181, 55 Atl. 324.

¹³ Kinney v. Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. 538; Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725.

¹⁴ Twitchell v. Devens, 45 Mo. App. 283.

¹⁵ Murray v. Harris, 57 Ill. App. 351. Account acknowledged. Leftwich Lumber Co. v. Florence Mutual Building, &c., Ass'n, 104 Ala. 584, 18 So. 48; Murray v. Rapley, 30 Ark. 568. Filing note where statute allows. Jarrett v. Hoover, 41 Neb. 231, 59 N. W. 353.

¹⁶ Lien statements, when filed, must be explicit and comprehensive to protect strangers to the contract, who may have other contracts relating to the same

essential facts, as the amount due or to whom furnished, it will be fatally defective,¹⁷ and cannot be aided by statements made in petition on foreclosure.¹⁸ The facts stated in the claim must not be at variance with proof adduced on trial.¹⁹

§ 101. **Claim or statement—designation of parties and description of building.**—The parties should be designated in the statement with a reasonable degree of certainty.¹ And in determining whether the parties have been properly designated, all the statements made in the claim are to be considered.² Only the names of interested parties need to be designated in the claim, or such names as may be necessary to show the

property, or liens thereon, from fraud, and may be required by the party at whose request the work is performed. *Carson v. White*, 6 Gill (Md.) 17.

¹⁷ *Fogarty v. Wisk*, 8 Daly (N. Y.) 166; *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304; *Getty v. Ames*, 30 Ore. 573, 48 Pac. 355.

¹⁸ *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304.

¹⁹ *Willson v. Nugent*, 125 Cal. 280, 57 Pac. 1008. See §§ 254, 255.

¹ *Pierce v. Osborn*, 40 Kan. 168, 19 Pac. 656; *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3; *Richards v. Lewisohn*, 19 Mont. 128, 47 Pac. 645. Though one states in his claim of lien that a certain person is owner and reputed owner of the premises, his lien is not impaired by proof that such person was the reputed owner only. *Kelly v. Lemberger* (Cal.), 46 Pac. 8. The certificate read, "We, B., W., and E., copartners under the name of B. E. & Co.," but was signed by the true name of the firm, B. W. &

Co.: the lien was not invalidated. *Shattuck v. Beardsley*, 46 Conn. 386. In a notice of a claim of lien for work and materials furnished a corporation, whose name is the "Installment Building & Loan Company," under a contract made with the corporation itself, it is an immaterial variance that the defendant is styled the "Installment Building & Loan Association." *Installment Building & Loan Co. v. Wentworth*, 1 Wash. St. 467, 25 Pac. 298. The plaintiff, whose name was Witte, filed a petition for a mechanic's lien under the name of Witter, and obtained a judgment therefor in his proper name. Held, that the petition might be amended and that the error did not avoid the judgment. *Witte v. Meyer*, 11 Wis. 309. See Dec. & Am. Dig. tit. Mechanics' Lien, § 135.

² *Connecticut*.—*Hooker v. McGlone*, 42 Conn. 95.

Michigan.—*McMonegal v. Willson*, 103 Mich. 264, 61 N. W. 495.

New York.—*Ogden v. Alexan-*

proper relation of parties interested.³ In case of partnership, the use of the firm name is sufficient and the names of the individual members need not be given.⁴ If the individual names are given and they are afterwards referred to as a firm, the variance will not be material.⁵ But it will be well to remember that a corporation is not the same as a partnership and that a claim against the individual corporation owners will not hold the corporation,⁶ nor vice versa.⁷ If the claim is a joint one, it has been held that it is not necessary to state whether the claimants are partners or merely joint claimants.⁸ But a statute requiring a statement to contain the name and residence of the claimants, was held not complied with where only the firm name and place of business was given.⁹ If no one is actually misled, however, a wrong designation will not defeat the lien

der, 140 N. Y. 356, 35 N. E. 639; Hubbell v. Schreyer, 56 N. Y. 604, 15 Abb. Pr. (N. Y.) 300.

Pennsylvania. — Sullivan v. Johns, 5 Whart. (Pa.) 366.

³ Hubbell v. Schreyer, 56 N. Y. 604, 15 Abb. Pr. (N. Y.) 300; Morgan v. Taylor, 15 Daly (N. Y.) 304, 5 N. Y. Supp. 920. In a suit to enforce a mechanic's lien against the property of the "Home Brewing Company of Grafton" for materials furnished the principal contractor for the construction of a building, it was held that a notice of a lien recorded in the name of "Home Brewing Company" was sufficient. Grafton Grocery Co. v. Home Brewing Co., 60 W. Va. 281, 54 S. E. 349.

⁴ Black's Appeal, 2 Watts & S. (Pa.) 179. Was not bad, because the claimants neither alleged therein a copartnership, nor filed the lien in the name of their co-

partnership, where all the members filed it and stated that they had a lien. Waters v. Goldberg, 124 App. Div. (N. Y.) 511, 108 N. Y. Supp. 992.

⁵ Miller v. Faulk, 47 Mo. 262. The list of items attached was headed "K to F. Bros. Dr." The affidavit purported to have been made by a member of the firm "for and in behalf of said firm of F. Bros." Held, that the affidavit was in substantial compliance with the statute. Klei-
ert v. Knoop, 147 Mich. 387, 110 N. W. 941, 13 Det. Leg. N. 1039.

⁶ Chicago Bldg & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84, 31 S. E. 809.

⁷ Sawyer Goodman Co. v. Neagle, 110 Ill. App. 178.

⁸ Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472.

⁹ Kane v. Hutkoff, 81 App. Div. (N. Y.) 105, 81 N. Y. Supp. 85.

right.¹⁰ It has been held that the omission of the claimant's christian name was not fatal.¹¹ Agency in such cases must be shown in order that work through an agency may be claimed and the allegation in the claim or statement that the work was done in pursuance to a contract with the agent of the owners, has been held to show such agency.¹² But a statement that the work is done at request of A. as the agent of B. as agent for eight others, does not show authority to bind the eight others.¹³ So, an allegation that a contract is with S, who holds a contract for B., has been held an insufficient designation of parties intended.¹⁴ But the mere fact that the agent designated as such alleges that there is owing him a certain amount which he claims, will not prevent the establishment of the claim of the true owner.¹⁵ The fact that names of persons are inserted, who are not parties, will not affect the lien, if done without fraudulent intent.¹⁶ Whether the lien statement must in addition to a description of the land upon which the building is located, contain a description of the building itself will depend upon the statutory provisions in relation thereto.¹⁷ Where the statute requires the building to be described, it must be described with the same certainty as is required in

¹⁰ *Bitter v. Mouat Lumber & Inv. Co.*, 10 Col. App. 307, 51 Pac. 519.

¹¹ *In re Hill's Estate*, 3 Pa. L. J. 323, 2 Clark (Pa.) 96.

¹² *Ward v. Conwell*, 8 Del. Co. Ct. (Pa.) 17.

¹³ *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996.

¹⁴ *McGlaufflin v. Beeden*, 41 Minn. 408, 43 N. W. 86. Making the claim agent the husband, will not bind the wife. *Finley's Appeal*, 67 Pa. St. 453.

¹⁵ *Lamb v. Hanneman*, 40 Iowa 41.

¹⁶ *McClain v. Hutton*, 131 Cal. 132, 63 Pac. 182. Where the statute makes the owner liable for improvements made by a lessee, the name of the lessee need not be given. *Steeves v. Sinclair*, 56 App. Div. (N. Y.) 448, 67 N. Y. Supp. 776; *Gass v. Souther*, 61 N. Y. Supp. 305.

¹⁷ Code Civ. Proc. 2130, provides for a mechanic's lien on a building or improvement on construction of which the labor or materials claimed for were used. Section 2133 extends the lien to the land on which the structures were erected, and section 2131

describing the land upon which it is located.¹⁸ In some cases this certainty is termed reasonable certainty.¹⁹ A description of a house will not include a fence made to enclose it,²⁰ nor a stable.²¹ Under some statutes a statement for the work or for repairs is fatally defective when it was in fact for a new structure,²² or an addition.²³ And a description as "a building" and "appurtenance" has been held bad for uncertainty.²⁴

§ 102. Claim or statement—notice of intention to claim.—

Unless the statute so directs, the lien statement need not contain an averment that notice of the intention to claim a lien has been given, but if the statute makes the giving of notice of the intention to file a claim a condition precedent to the right to file the claim, then the statement must contain an averment that such notice has been given.¹ Facts not required by the

provides that a person desiring to perfect a mechanic's lien must file a notice containing a correct description of the property to be charged. Held, that the property to be identified under section 2131 is the building or improvement on which the lien is given, and hence a specific description of the land is not required. *Western Iron Works v. Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac. 413.

¹⁸ See §§ 77 and 103. See Dec. & Am. Dig. tit. Mechanics' Liens, § 136.

¹⁹ *Turner v. Robbins*, 78 Ala. 592; *Whitenack v. Noe*, 3 Stockt. (N. J. Eq.) 321.

²⁰ *Riverside Lumber Co. v. Hampton*, 7 Houst. (Del.) 486, 32 Atl. 960.

²¹ *Bevan v. Thackara*, 143 Pa. St. 182, 22 Atl. 873, 28 W. N. C. (Pa.) 473.

²² *Cox v. Flanagan* (N. Y.), 2 Atl. 33; *Harman v. Cummings*, 43 Pa. St. 322. A claim is insufficient which fails to describe the building, its character, size and materials of construction, and which fails to state the year when the items were furnished, though the month and day of month are given. *Nolan v. Warren*, 11 (Pa.) Dist. 561.

²³ *Whitenack v. Noe*, 3 Stockt. (N. J. Eq.) 321; *Linck v. Wolf* (Pa.), 4 Atl. 23.

²⁴ *Barclay's Appeal*, 13 Pa. St. 495. It may be explained by a bill attached to a claim. *Killingsworth v. Allen*, 1 Phila. (Pa.) 220, 8 Leg. Int. (Pa.) 126.

¹ *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883; *Riter v. Houston Oil Refining, &c., Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758; *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

statute need not be set out.² Under the Pennsylvania system which requires notice of the intention to file a lien, the averment must be made in the statement or no lien will be acquired.³ And generally whatever notice is required by statute must be given.⁴ Where the statute does not require notice of the intention to claim a lien to be given before the lien statement is filed, it is very often required that the notice must afterwards be given.⁵ Where such notice is required, the notice itself is the best evidence of its having been given, and under such statutes it is held that any written copy is a notice in writing.⁶ Under the New York statute the failure to give such notice does not defeat the lien unless the owner has made payments without knowledge of the existence of the lien claimed.⁸ It is not necessary that the statement itself contain

² *Harbolshelmer v. Totten*, 7 Pa. Co. Ct. (Pa.) 665; *Geigle v. Lavis*, 1 Wilcox (Pa.), 208; *Jeffersonville Water Supply Co. v. Ritter*, 146 Ind. 521, 45 N. E. 697.

³ *Fuller v. Grim*, 30 Pittsb. Leg. J. (N. S.) (Pa.) 83; *Irwin v. Nit-tany Rod & Gun Club*, 23 Pa. Co. Ct. 375; *Purvis v. Ross*, 12 Pa. Co. Ct. 193; *West Chester v. Sahler*, 8 Pa. Co. Ct. 656; *Dreibelbis v. Seazholtz*, 8 Pa. Co. Ct. 655; *Foster v. Montanye*, 7 Kulp, (Pa.) 14; *German Fairhill Bldg. Ass'n No. 2 v. Heebner*, 13 Montg. Co. Law Rep'r (Pa.) 56, 3 Pa. Super. Ct. 643; *Uber v. McAfee*, 2 Pa. Dist. 372; *Langenheim v. Anschultz-Bradberry Co.*, 2 Pa. Super. Ct. 285, 38 W. N. C. 505. Sub-contractors need not. *Werner Saw Mill Co. v. Chemical Co.*, 33 Pittsb. L. J. 193, 11 Pa. Dist. 722.

⁴ *Missouri*.—*McDonnell v. Nicholson*, 67 Mo. App. 408.

New York.—*White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118; *New Jersey Steel & Iron Co. v. Robinson*, 85 App. Div. (N. Y.) 412, 83 N. Y. Supp. 450; *McKinney v. White*, 15 App. Div. (N. Y.) 423, 44 N. Y. Supp. 561.

Utah.—*Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008. But if no prejudice to anyone is shown, the omission to give it would not be fatal. *Sandberg v. Victor Gold & Silver Min. Co.*, 24 Utah 1, 66 Pac. 360. A demand at the conclusion of a notice, "that claimant have the benefit of the law allowing the lien" is equivalent to a statement that he claims a lien. *Brigham v. Knox*, 127 Cal. 40, 59 Pac. 198.

⁵ See §§ 53-56.

⁶ *Armstrong v. Chisholm*, 100 App. Div. (N. Y.) 440, 91 N. Y. Supp. 693; *Lentz v. Eimermann*, 119 Wis. 492, 97 N. W. 181.

⁸ *La Paska v. Well*, 20 Misc. (N. Y.) 10, 44 N. Y. Supp. 778.

an averment that the labor was performed or material furnished within the time limit as such a matter is a question of fact to be proved on trial.⁹ However it is necessary that the averments in the lien statement show that the statement has been filed within the statutory time,¹⁰ even though the fact be otherwise.¹¹ The mere fact that the lien has no date will not affect it.¹² If the lien statement is defective in verification or even in other matters, it may generally be amended before the time limit has expired without affecting the validity of the lien.¹³

§ 103. Claim or Statement—Description of Property. The statutes usually require the lien statement to contain a description of the property which it is sought to be made subject to the lien.¹ As a matter of course where the statute so requires, a failure to comply will be fatal, and as a general rule, it may be said that even though the statute does not have such a requirement, a lien statement that does not have a description of the property will not be of much value.²

⁹ *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918.

¹⁰ *Henry, etc., Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Chappel v. Smith*, 40 Neb. 579, 59 N. W. 110.

¹¹ *Olson v. Pennington*, 37 Minn. 298, 23 N. W. 791.

¹² *Rosenberg v. Union Iron & Foundry Co.*, 63 Ill. App. 99.

¹³ *Kansas*.—*Buckland v. Golt*, 23 Kan. 327.

Illinois.—*Kruse v. Willson*, 79 Ill. 233.

Massachusetts.—*Jackman v. Gloucester*, 143 Mass. 380, 9 N. E. 740.

New York.—*Sage v. Stafford*, 59 N. Y. Supp. 545. See § 62, as to time within which claim must be filed.

¹ *Alabama*.—*Salter v. Goldberg*, (Ala.), 43 So. 571.

Missouri.—*Darlington Lumber Co. v. Harris*, 107 Mo. App. 148, 80 S. W. 688; *Mayes v. Murphy*, 93 Mo. App. 37, 67 S. W. 742.

Nebraska.—*Drexel v. Richards*, 48 Nebr. 732, 50 Nebr. 509, 70 N. W. 23.

Pennsylvania.—*Morrow v. Corcoran*, 9 Kulp. (Pa.) 314. Not so strict as to personal property. *Olson v. Pennington*, 37 Minn. 298, 33 N. W. 791. See Dec. & Am. Dig. tit. Mechanics' Liens § 136.

² *Merchants', &c., Bank v. Hollis*, 37 Tex. Civ. App. 479, 84 S. W. 269.

Where no description is given, the defect is of such character that a court cannot supply the omission.³ The general rule is that a description is sufficient which enables a party familiar with the locality to identify the property with reasonable certainty.⁴ Some courts hold the description sufficient if it

³ *Drexel v. Richards*, 48 Neb. 732, 67 N. W. 742; *Holmes v. Nutchins*, 38 Neb. 601, 57 N. W. 514.

⁴ *Alabama*.—*Alabama State Fair, &c., Ass'n v. Alabama Gas Fixture, &c., Co.*, 131 Ala. 256, 31 So. 26; *Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 16 L. R. A. 600.

Illinois.—*Wood v. Gumm*, 67 Ill. App. 518.

Indiana.—*Lundley v. Cross*, 31 Ind. 106.

Kansas.—*Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22.

Massachusetts.—*Pollock v. Morrison*, 176 Mass. 83, 57 N. E. 326.

Minnesota.—*Evans v. Sanford*, 65 Minn. 271, 68 N. W. 21; *Nystrom v. London, &c., Mortg. Co.*, 47 Minn. 31, 49 N. W. 394.

Missouri.—*De Witt v. Smith*, 63 Mo. 263; *Matlack v. Lare*, 32 Mo. 262; *Hammond v. Darlington*, 109 Mo. App. 333, 84 S. W. 446; *Hydraulic Press Brick Co. v. Schlingmann*, 88 Mo. App. 17; *Buchanan v. Cole*, 57 Mo. App. 11; *Fairbanks v. Crescent Elevator Co.*, 52 Mo. App. 627.

Montana.—*Western Iron Works v. Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac. 413.

Nebraska.—*Drexel v. Richards*, 50 Neb. 511.

North Dakota.—*Red River*

Lumber Co. v. Friel, 7 N. Dak. 46, 73 N. W. 203; *Howe v. Smith*, 6 N. Dak. 432, 71 N. W. 552.

Pennsylvania.—*Safe Deposit & Steel Co. v. Columbia Iron & Steel Co.*, 176 Pa. St. 536, 35 Atl. 229; *Titusville Iron Works v. Keystone Oil Co.*, 130 Pa. St. 211, 18 Atl. 739; *In re Messersmith's Estate*, 1 Dauph. Co. (Pa.) 223; *Cowdrick v. Morris*, 9 Pa. Co. Ct. (Pa.) 312.

Texas.—*Swope v. Stantzenberger*, 59 Tex. 387.

United States.—*Hooven, &c., Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229. Where a mechanic's lien describes the land sought to be subjected, names each building thereon, and refers to, and makes a part of the lien, a map of the premises, it is sufficient. *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 27 Atl. 895; *Linden Steel Co. v. Imperial Refining Co.*, 138 Pa. St. 10, 20 Atl. 867, 869; *In Tibbets v. Moore*, 23 Cal. 208, the description was: "A quartz mill, being at or near the town of Scottsville in Amador County, known as 'Moore's New Quartz Mill,'" The court held, that if there was no other quartz mill at the place named, the description was sufficient. *In Hotaling v. Cronise*, 2 Cal. 60, the description of the property in the affi-

is such that the land is susceptible of ready ascertainment,⁵ and in other jurisdictions it is enough that the land is described with the certainty that is ordinarily used in conveyances,⁶ or that the court could decree a sale and the purchaser would be able to find the land,⁷ or that the sheriff could discover it and sell it on execution.⁸ But in no case is the description required to be more definite than a reasonable interpretation of the statute requires.⁹ And it is held that extrinsic evidence is

davit for a lien was: "A wharf situated on Battery street, between Pacific and Jackson streets, in San Francisco." The court contented itself by saying that it thought the description of the property sufficiently certain. In *Rose v. Persse & Brook Paper Works*, 29 Conn. 256, the description in the affidavit filed for the lien was: "Two tracts of land situated in the town of W, one bounded with two paper mills thereon; and the other bounded with one paper mill thereon." The court held that the affidavit filed for a lien was void as not containing a reasonably accurate description of the premises. In *Caldwell v. Asbury*, 29 Ind. 451, the description in the affidavit was "House and lot on the southwest corner of Fourth and Oak streets, in Terre Haute, Indiana." The court said that this description was capable of being reduced to a certainty, and applying the rule "that is certain which may be made certain," held the description sufficient to sustain the lien. In *Brown v. LaCrosse City Gas, Light & Coke Co.*, 16 Wis. 578,

the description was: "The several buildings known as the gas works of the La Crosse City Gas, Light & Coke Company, situated on lots number 8, 9, etc., in block 14." As a matter of fact the buildings were situated on other lots but the court held that the description was sufficient to pass the title of the real estate upon which the works were situated, and, therefore, sufficient to sustain the mechanic's lien. *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, judgment modified, 89 Pac. 1081.

⁵ *Rockwell v. O'Brien-Green Co.*, 62 Ill. App. 293; *O'Brien v. Krockinski*, 50 Ill. App. 456; *Kealing v. Voss*, 61 Ind. 466; *Doyle v. Wagner*, 100 Minn. 380, 111 N. W. 275. Familiar with locality. *Gulon v. Ryckman*, 77 Neb. 833, 110 N. W. 759.

⁶ *Bank of Charlestown v. Curtiss*, 18 Conn. 342; *Knox v. Starks*, 4 Minn. 7.

⁷ *Knox v. Starks*, 4 Minn. 7; *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

⁸ *Ely v. Wren*, 90 Pa. 148.

⁹ *Heier v. Melsch*, 33 Mo. App. 35; *Brown v. Wright*, 25 Mo. App. 54.

admissible to aid in identifying the premises sought to be described in the statement.¹⁰ But in such cases the extrinsic evidence must be confined to exemplifying or illuminating the facts set forth in the statement and not for the purpose of supplying new material matters.¹¹ The fact that more land is included than should rightfully be included, does not invalidate the lien.¹² A statement containing nothing more than the state and county,¹³ and the mere starting point,¹⁴ or the name of the state, county and city,¹⁵ or the name of the building only,¹⁶ or giving unknown courses,¹⁷ or an entirely wrong description,¹⁸ or such that the premises cannot be identified,¹⁹ by an ordinarily intelligent and careful man, is insufficient.²⁰ There is great reluctance on the part of courts, however, to set aside liens, on the ground of looseness of description, as it is recognized that such claims may be filed by persons who are

¹⁰ *Drexel v. Richards*, 50 Neb. 509, 70 N. W. 23; *Owens v. Hord*, 14 Tex. Civ. App. 1, 37 S. W. 1093.

¹¹ *Mertens v. Cassini, &c.*, Tile Co., 53 W. Va. 192, 44 S. E. 245. Certainty to a common intent is sufficient. *Holland v. Garland*, 13 Phila. (Pa.) 544; *Ewing v. Barras*, 4 Watts & S. (Pa.) 467.

¹² *McClain v. Hutton*, 131 Cal. 132, 63 Pac. 182; *Sorg v. Pfalzgraf*, 113 Ill. App. 569; *Western Cornice Manuf'g Works v. Leavenworth*, 52 Neb. 418, 72 N. W. 582; *Mivelaz v. Johnson*, 124 Ky. 251, 30 Ky. L. 389, 98 S. W. 1020.

¹³ *Penrose v. Calkins*, 77 Cal. 396, 19 Pac. 641.

¹⁴ *Barrows v. Baughman*, 9 Mich. 213.

¹⁵ Not giving lot number. *Drexel v. Richards*, 48 Neb. 732, 67 N. W. 742.

¹⁶ A description of property in a statement of a lien as "thirty

lengths of cornerribbing at Wills Station," is too indefinite. *Roose v. Billingsly, &c.*, Commission Co., 74 Iowa 51, 36 N. W. 885. A claim describing the property as a double saw mill in Clarion county, Pennsylvania, situate on the waters of the Clarion river, and on the east side of said river is deficient. *Washburn v. Russell*, 1 Pa. 499.

¹⁷ *Young v. Howell*, 5 Wash. 239, 31 Pac. 629.

¹⁸ *Muto v. Smith*, 175 Mass. 175, 55 N. E. 1041; *Whittier v. Stetson, &c.*, Mill Co., 6 Wash. 190, 33 Pac. 393.

¹⁹ *Mt. Tacoma Mfg. Co. v. Cultum*, 5 Wash. 294, 32 Pac. 95; *Dusick v. Meiselbach*, 118 Wis. 240, 95 N. W. 144; *Sprickerhoff v. Gordon*, 120 App. Div. (N. Y.) 748, 105 N. Y. Supp. 586.

²⁰ *Lalrd-Norton Co. v. Hopkins*, 6 S. Dak. 217, 60 N. W. 857.

not skilled in legal matters.²¹ Where the work is done on different buildings even where included in the same lien statement, the buildings ought to be separately described.²² But in other cases, it has been held that if the land is contiguous, and separate buildings are located thereon, they may be described in bulk.²³

§ 104. Claim or statement—Portion of land to be described.

—As before stated, the lien will not be invalidated because it contains more land in its description than is properly subject to a lien.¹ Especially is this true where the property that is properly subject to the lien can be definitely ascertained,² and

²¹ *McClintock v. Rush*, 63 Pa. 203.

²² *Friedlaender v. McCann*, 91 Ill. App. 415; *Hooven, &c., Co. v. Featherstone*, 99 Fed. 180; *Mertens v. Cassini, &c., Tile Co.*, 53 W. Va. 192, 44 S. E. 241. And sometimes this is held to be a matter of pleading. *Bruce v. Hoos*, 48 Mo. App. 161; *Twitchell v. Devens*, 45 Mo. App. 283.

²³ *Connecticut*.—*Rose v. Persse, &c., Paper Works*, 29 Conn. 256.

Illinois.—*Moore v. Parish*, 163 Ill. 93, 45 N. E. 573; *Prendergast v. McNally*, 76 Ill. App. 335.

Indiana.—*Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218.

Massachusetts.—*York v. Barstow*, 175 Mass. 167, 55 N. E. 846.

Oregon.—*Watson v. Noonday Min. Co.*, 37 Ore. 444, 60 Pac. 994. Material men furnished materials for the construction of three buildings on land belonging to the same owner, and it was impossible for them to know what materials were intended for each

building, failure to distribute the materials furnished among the several buildings did not invalidate their lien; its only effect in any event being to postpone their claim to those of other lien creditors. *Fulton v. Parlett*, 104 Md. 62, 64 Atl. 58.

¹ *Colorado*.—*Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

Indiana.—*Scott v. Goldinhorst*, 123 Ind. 268, 24 N. E. 333.

Iowa.—*Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177.

Minnesota.—*Evans v. Sanford*, 65 Minn. 271, 68 N. W. 21; *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550; *North Star Iron Works Co. v. Strong*, 33 Minn. 1, 21 N. W. 740.

New Jersey.—*Derrickson v. Edwards*, 5 Dutch. (N. J. L.) 468; *Edwards v. Derrickson*, 4 Dutch. (N. J. L.) 39; *Whitenack v. Noe*, 3 Stockt. (N. J. Eq.) 321.

² *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Bradish v. James*, 83 Mo. 313; *Oster v. Rabeneau*, 46 Mo.

more has been included without fraudulent intent.³ But in this respect, it should be remembered that a more definite description is not required than the statute prescribes,⁴ if alleged with sufficient certainty.⁵ Where the statute limits the lien to a certain acreage, that acreage should be described so that it can be identified.⁶ But a description valid between original parties may be void for uncertainty where the interests of third persons have intervened.⁷ Generally the curtilage need

595. Parties were not misled; *Crawfordsville v. Johnson*, 51 Ind. 397.

Insufficient—Two mills, situated on blocks numbered three and four in a certain town, the blocks separated by a street, one of the mills being built on portions of all of the lots in block three, and the other on a part of the lots in block four. *Lemly v. La Grange Iron, &c., Co.*, 65 Mo. 545. The court may order a survey. *Swope v. Stantzenberger*, 59 Tex. 387.

³ *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. 104, 3 Am. St. 262.

⁴ *Tibbetts v. Moore*, 23 Cal. 208; *Crawfordsville v. Boots*, 76 Ind. 32, *Gerard v. Birch*, 1 Stew. (N. J. Eq.) 317.

⁵ *Irwin v. Crawfordsville*, 72 Ind. 111; *Crawfordsville v. Irwin*, 46 Ind. 438. See § 71.

Insufficient—Where a notice of a lien, under the mechanic's lien law, described the property as follows: "A part of lot 3, section 36, township 33, range 4 west, containing 5 acres, situated in Starke county, Indiana," it was held void for uncertainty. *Howell v. Zerbee*, 26 Ind. 214.

"The north part" of a specified lot in a named addition, "as well as the one-story frame dwelling house recently erected thereon by you," is insufficient. *Maynard v. East*, 13 Ind. App. 432, 41 N. E. 839, 55 Am. St. 238. Describing the property to be charged as a dwelling house on the "south end of lot 6," to which the said A has a leasehold interest, when in fact A's leasehold interest was to 100 feet on the north end of the lot, held not sufficient to establish a lien. *Runey v. Rea*, 7 Ore. 130. See also, *Williams v. Porter*, 51 Mo. 441; *Kellogg v. Littell & Smythe Mfg. Co.*, 1 Wash. 407, 25 Pac. 461; *Cowle v. Ahrenstedt*, 1 Wash. 416, 25 Pac. 458.

⁶ *Ranson v. Sheehan*, 78 Mo. 667. A description: "Said house is situated near the northeast corner of the northeast quarter of southwest quarter of section 9, township 50, range 10, in Audrain county, Missouri, is insufficient to create a lien, for failure to specify the acre on which the lien is claimed. *Wright v. Beardsley*, 69 Mo. 548.

⁷ *Rall v. McCrary*, 45 Mo. App. 365.

not be included in the description.⁸ As a matter of course, the lien cannot be enforced on land that is not included in the description.⁹ But under a statute allowing a reasonable space about the building to be held subject to the lien on the building, and the building was on two adjoining lots, one of which was described, the description was held sufficient.¹⁰ If no one is fraudulently affected by the omission of a very small portion of land, the lien will be held to cover such portion omitted.¹¹ Generally where a lot is described as facing on a street, it means the entire lot extending through to the other street or alley, as the case may be.¹² A description that mentions the street and number with the number of feet,¹³ and with the name of the owner,¹⁴ or designates the corner of intersecting streets,¹⁵ or on a street leading from a designated place, opposite a certain street naming the occupant,¹⁶ or designating the house and street, as between two certain streets,¹⁷ or naming the side of the street, or in a certain place adjoining two

⁸ Pretz's Appeal, 35 Pa. 349; Holmes v. Hutchins, 38 Neb. 601, 57 N. W. 514. No lien if there is no description. Bell v. Bosche, 41 Neb. 853, 60 N. W. 92.

⁹ Willamette Steam Mill, etc., Co. v. Kremer (Cal.), 24 Pac. 1026; Barnett v. Murray, 62 Mo. App. 500.

¹⁰ Willamette Steam Mill, etc., Co. v. Kremer, 94 Cal. 205, 29 Pac. 633.

¹¹ Springer v. Kroeschell, 161 Ill. 358, 43 N. E. 1084.

¹² Field v. Oberteuffer, 2 Phila. (Pa.) 271, 14 Leg. Int. 124.

¹³ France v. Woolston, 4 Houst. (Del.) 557; Walkam v. Henry, 7 Misc. (N. Y.) 532, 27 N. Y. Supp. 997.

¹⁴ Gillisple v. Remington, 66 Tex. 108, 18 S. W. 338.

¹⁵ Caldwell v. Asbury, 29 Ind. 451.

¹⁶ Parker v. Bell, 7 Gray (Mass.) 429.

¹⁷ Matlack v. Lare, 32 Mo. 262; Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691. A description: "That certain three-story building No. ———, situate and being in the city of Richmond, Va., on G Street, between S and H streets, and the lot or piece of ground and curtilage appurtenant to the said building, fronting on the south side of G street, 49 feet, and running back 156 feet, more or less of which Wirt E. Taylor is the owner or reputed owner," held sufficient. Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888.

designated places, is sufficient.¹⁸ But in such cases, the property must be such as can be ascertained from the statement.¹⁹ And whether or not it can be, is a question of fact for the jury.²⁰ Lot and block numbers, giving state and city, are generally sufficient, when correctly stated.²¹ Especially is this true when such description is sufficient to put interested parties on inquiry.²² If a plat is vacated, a description by blocks will not include the land in the vacated streets, but would include the land within the designated lots.²³ If the owner obliterates the lines of demarkation between two adjoining lots a description reaching over an adjoining lot will be held good.²⁴ A description by giving the name of the land grant,²⁵ or the section and township numbers, has been held sufficient.²⁶

§ 105. Claim or statement—Description of building—Error.—Where the building is to be described, the same rule applies

¹⁸ *Duffy v. Brady*, 4 Abb. Pr. (N. Y.) 432; *Parker v. Bell*, 7 Gray (Mass.) 429; *Shaw v. Barnes*, 5 Pa. St. 18, 47 Am. Dec. 399; *Shaffer v. Hull*, 3 Pa. L. J. 321.

¹⁹ *In re Hill's Estate*, 2 Clark (Pa.) 96, 3 Pa. L. J. 323.

²⁰ *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394.

²¹ *O'Halloran v. Leachey*, 39 Ind. 150; *Hill v. Gray*, 81 Mo. App. 456; *Whiteside v. Lebcher*, 7 Mont. 473, 17 Pac. 548; *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. 104; *Dickson v. Corbett*, 11 Nev. 277; *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161.

²² *White v. Stanton*, 111 Ind. 540, 13 N. E. 48. Block number alone held insufficient as not stating quantity of land sought to be held. *Knox v. Starks*, 4 Minn. 7.

²³ *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25, 65 N. W. 1017.

²⁴ *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588, 73 S. W. 137. Where the lots were described as 1 and 2, and the proofs showed them to be 1 and 3, only lot one was held. *Heyde v. Sult*, 22 Ind. App. 83, 52 N. E. 456.

²⁵ *Ford v. Springer Land Assn*, 8 N. M. 37, 41 Pac. 541.

²⁶ A description of land, in the notice of lien, by sections and townships, is sufficient, even if the amount of land which such sections if full, would contain, exceeds the number of acres stated, as a township does not necessarily contain the full amount of 36 sections. *Springer Land Assn. v. Ford*, 168 U. S. 513, 42 L. ed. 561, 18 Sup. Ct. 170.

as in the description of the land, that is, it must be sufficient to identify the property sought to be held.¹ If otherwise sufficient, giving the wrong number of stories,² inaccurate width or depth, will not defeat the lien.³ However, a description mentioning "certain frame buildings" on lot 13, when it should have been 14, is not sufficient.⁴ As a general rule a description of the main building will not include other structures even if appurtenant, such as fences, outhouses, or stables, especially when not all erected under one contract.⁵ A "double house" is not the same as a block of two buildings.⁶ Merely giving a description of the labor, without mention of buildings, when it is necessary to mention buildings, will be insufficient.⁷ And the same is true if it is so indefinite that it can not be ascertained upon which one of several buildings a lien is claimed.⁸

¹ *Tibbets v. Moore*, 23 Cal. 208; *McNamee v. Rauck*, 128 Ind. 59, 27 N. E. 423; *Northwestern Cement, etc., Co. v. Norwegian, etc., Seminary*, 43 Minn. 449, 45 N. W. 868. *Mountain City Market House Assn. v. Kearns*, 103 Pa. St. 403; *Mercer Milling & Lumber Co. v. Kreaps*, 18 Pa. Super. Ct. 1; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675. Claiming a lien on a designated church in a certain town, for material furnished, though it describes the lot on which the building is situated as lying in an addition which does not exist, is sufficient. *Harrisburg Lumber Co. v. Washburn*, 29 Ore. 150, 44 Pac. 390. A mill propelled only by water at the time of filing a lien against it, but afterwards propelled by steam, and being two stories high, with a low stone basement, and a window in the gable end, was described as

a two-story frame steam grist-mill, with an accurate description as to location, the description was good. *Brundage v. Phillips*, 3 Grant Cas. (Pa.) 313. The description, "the brick city hall building to be erected in the city of Hillsboro," is sufficient. *Scholes v. Hughes*, 77 Tex. 482, 14 S. W. 148. See Dec. & Am. Dig. tit. *Mechanics' Liens*, § 136.

² *Wethered v. Garrett*, 7 Pa. Co. Ct. 529, 535.

³ *Kennedy v. House*, 41 Pa. 39, 80 Am. Dec. 594.

⁴ *Goodrich Lumber Co. v. Davie*, 13 Mont. 76, 32 Pac. 282.

⁵ *Miller v. Heath*, 22 Pa. Super. Ct. 313.

⁶ *Roat v. Freer*, 167 Pa. St. 614, 31 Atl. 861.

⁷ *Warren v. Quade*, 3 Wash. 750, 29 Pac. 827.

⁸ *Short v. Ames*, 121 Pa. 530, 15 Atl. 608; *Wharton v. Douglas*, 92 Pa. St. 66; *Hassenfus v. Philadel-*

As a general rule a correct description of the land will include the building on it, and the lien will attach to all, although the buildings are not mentioned.⁹ Merely giving the wrong block number,¹⁰ or section,¹¹ where enough remains to identify the property, will not be fatal as between original parties.¹² If the lien can be held upon the building, separate from the land, and the description of the building is correct, and that of the land incorrect, it will be valid.¹³ Unless the error in the name of street or subdivision is such as will mislead, or fail to identify the property, it will generally be held to be immaterial.¹⁴ If the mistake is a palpable one and does not mislead any one, it will not be fatal.¹⁵ But if the statement fails to name the

phia Packing, &c., Co., 15 Pa. Co. Ct. 650; *In re Philadelphia Packing Co.'s Estate*, 4 Pa. Dist. 57.

⁹ *Johnson v. Salter*, 70 Minn. 146, 72 N. W. 974.

¹⁰ *McLean v. Young*, 2 MacArthur, (D. C.) 184; *DeWitt v. Smith*, 63 Mo. 263; *Holland v. Garland*, 13 Phila. (Pa.) 544.

¹¹ *Tulloch v. Rogers*, 52 Minn. 114, 53 N. W. 1063.

¹² *National Lumber Co. v. Bowman*, 77 Iowa 706, 42 N. W. 557.

¹³ *Alabama*.—*Bedsole v. Peters*, 79 Ala. 133; *Turner v. Robbins*, 78 Ala. 592.

Florida.—*Emerson v. Gainey*, 26 Fla. 133, 7 So. 526.

Michigan.—*Hannah, &c., Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120.

Missouri.—*Hydraulic Press Brick Co. v. Schlingmann*, 88 Mo. App. 17.

Nebraska.—*Western Cornice Manuf'g Works v. Leavenworth*, 52 Neb. 418, 72 N. W. 592.

Oregon.—*Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407.

¹⁴ *Bassett v. Menage*, 52 Minn. 121, 53 N. W. 1064; *McHugh v. Slack*, 11 Wash. 370, 39 Pac. 674. In describing land in a mechanic's lien, the omission of the first letter "n" in the word "Downing" street is immaterial. *O'Brien v. Krockinski*, 50 Ill. App. 456. The description of the premises filed with the register of deeds, viz., lots 5 and 6, in block 18, in "North Minneapolis Addition to Minneapolis," sufficiently identifies lots 5 and 6, in block 18, in "North Minneapolis," within the city of Minneapolis. *Russell v. Hayden*, 40 Minn. 88, 41 N. W. 456.

¹⁵ Describing the property against which the lien is sought as lot 21 in "Haney's" instead of "Henley's" addition to a certain town, will be held sufficient as to owners who had the building erected, when it appears that they suggested the filing of the lien, that there is no such lot as the former in the town, that the

city or county, or contain other statements whereby the property can be identified, it is void.¹⁶ The owner's name is always considered to be a very great aid in the description of the property, as liens are usually indexed in the owner's name.¹⁷ But if it cannot be identified with the owner's name, then the giving of such name will not aid in the description of the property.¹⁸

§ 106. Claim or statement—Averment of ownership.—One of the purposes of the lien statement being to fasten a lien on a certain person's property, it necessarily follows that the statement that does not on its face show the person whose property it is sought to make subject to the lien, is void.¹ The name may be omitted under some authorities when it is un-

contractors have never erected any other building for them, and that they have not had any other building erected within the town for 10 years. *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 33 L. R. A. 685.

¹⁶ *Anderson v. Bingham*, 1 Colo. App. 222, 28 Pac. 145; *Brown v. Myers*, 145 Pa. St. 17, 23 Atl. 254, 29 W. N. Cas. 393.

¹⁷ *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445. If there remains sufficient for identification, it is valid. *Martin v. Simmons*, 11 Colo. 411, 18 Pac. 535; *Wright v. Beardsley*, 69 Mo. 548; *Tinker v. Geraghty*, 1 E. D. Smith (N. Y.) 687.

¹⁸ *Springer v. Keyser*, 6 Whart. (Pa.) 186; *Montrose v. Conner*, 8 Cal. 344. A mechanic's claim against a house and lot in A township, B county, belonging to C, adjoining lands of D, is sufficiently descriptive of the locality, where it does not appear

that C had other lands in the same township. *Knabb's Appeal*, 10 Pa. 186, 51 Am. Dec. 472. Name of husband for that of wife, insufficient. *Basshor v. Kilbourn*, 3 MacArthur (D. C.) 273.

¹ *California*.—*Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336; *Hicks v. Murray*, 43 Cal. 515.

Kansas.—*Blattner v. Wadleigh*, 48 Kan. 290, 29 Pac. 165.

Maryland.—*Reindollar v. Flickinger*, 59 Md. 469.

Montana.—*Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594.

Nevada.—*Malter v. Falcon Min. Co.*, 18 Nev. 209, 2 Pac. 50.

New York.—*McElwee v. Sandford*, 53 How. Pr. (N. Y.) 89; *Beals v. Cong. B'Nal Jeshurun*, 1 E. D. Smith, (N. Y.) 654.

Rhode Island.—*Bliss v. Patten*, 5 R. I. 376.

Texas.—*Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338.

Wyoming.—*Wyman v. Quayle*, 9

known,² and this fact is averred.³ Under some statutes it is sufficient if the name of the reputed owner is given⁴ but even then it must be shown that the real owner is not known.⁵ And where no provision is made in the statute as to the name of the reputed owner being sufficient, then it has been held that where the name given is the best that could be known from information and belief, that was sufficient.⁶ Under a statute that provided that the claimant should make an "account in writing," with no reference to statement of the owner's name, it has been held that this could be inferred from the statements made in reference to the account.⁷ Under

Wyo. 335, 63 Pac. 988; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178. Substantial compliance. *United States Blowpipe Co. v. Spencer*, 61 W. Va. 191, 56 S. E. 345.

² *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. The name is presumed to be correctly given. *Kelly v. Lemberger*, (Cal.) 46 Pac. 8. See Dec. & Am. Dig. tit Mechanics' Liens § 137.

³ *Russell v. Hayner*, 130 Fed. 90, 64 C. C. A. 424.

⁴ *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575; *In re Gilbert Hill's Estate*, 2 Clark (Pa.) 96, 3 Pa. L. J. 323; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001; *Ford v. Springer Land Assn.*, 8 N. M. 37, 41 Pac. 541. A recorded notice of a lien which stated that "S. A. is the name of the reputed owner of the premises," sufficiently named the owner, where S. A. owned the premises, since he could not have been misled by being described as "reputed owner." *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363.

⁵ *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923, 1 Am. St. 482; *Christine v. Manderson*, 2 Pa. St. 363; *Springer Land Ass'n. v. Ford* 168 U. S. 513, 42 L. ed. 561, 18 Sup. Ct. 170. Under Code, § 3672, requiring among other things, the name of the owner or reputed owner of the property sought to be subjected, a notice reciting that the land on which the lien is claimed is reputed to be owned by one H., and the building thereon, by reason of which the lien arose, is reputed to be owned by one R., is sufficient. *Allen v. Rowe*, 19 Ore. 188, 23 Pac. 901.

⁶ *Hurlbert v. New Ulm Basket Works*, 47 Minn. 81, 49 N. W. 521.

⁷ *Nebraska*.—*Garlichs v. Donnelly*, 42 Neb. 57, 60 N. W. 323; *Wakefield v. Latey*, 39 Neb. 285, 57 N. W. 1002; *Hays v. Mercier*, 22 Neb. 656, 35 N. W. 894.

New York.—*Spruck v. McRoberts*, 64 Hun (N. Y.) 634, 19 N. Y. Supp. 128.

statutes that allow the building to be held liable for the lien separate from the lot of land upon which it is located, then the statement will be good as to the building if correctly described, if it did not contain the correct name of the owner of the land.⁸ If the wrong name is given through the fault of the real owner, he will be estopped from taking advantage of that fact.⁹ An allegation of ignorance of the owner's name, will not excuse a failure to give the true name, if the claimant did not exercise diligence in trying to ascertain it.¹⁰ Where property is transferred during the work, it is advisable to set up both the name of the person who was owner when the claimant was employed, and the owner when the lien is filed.¹¹ As a general rule, however, it is sufficient if the name of the person is given who owns the property when the lien is filed.¹² If the name given is that shown by the public records, this is sufficient.¹³ By owner, is meant the owner of the legal and not the equitable title,¹⁴ but it is not necessary for the statement to show whether the owner's interest is of a legal or equitable charac-

North Dakota. — *Red River Lumber Co. v. Friel*, 7 N. Dak. 46, 73 N. W. 203.

⁸ *Montana Lumber, &c., Co. v. Obelisk Mining, &c., Co.*, 15 Mont. 20, 37 Pac. 897.

⁹ *Waters v. Johnson*, (Mich.) 96 N. W. 504, 10 Detroit Leg. N. 513. If the name of one member of the firm is given, the others not showing that they are prejudiced, it is sufficient. *Cady Lumber Co. v. Conkling*, 70 Neb. 807, 98 N. W. 42.

¹⁰ *Waters v. Johnson*, 134 Mich. 436, 96 N. W. 504, 10 Det. Leg. N. 513.

¹¹ *Ah Louis v. Harwood*, 140 Cal. 700, 74 Pac. 41. Gen. Laws, c. 206, § 7, requiring the lodged account for a mechanic's lien to

contain a notice "to * * * whose estate in the same the said account refers," means the owner when the construction was begun and the lien attached, and not the owner when the account was lodged. *Chace v. Pidge*, 21 R. I. 70, 41 Atl. 1015.

¹² *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989; *Davis v. Big Horn Lumber Co.*, 14 Wyo. 517, 85 Pac. 980.

¹³ *Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 Pac. 519; *Shryock v. Hensel*, 95 Md. 614, 53 Atl. 412.

¹⁴ *Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 Pac. 179.

ter,¹⁵ in the lands described.¹⁶ Out of abundant caution, it is advisable to state the names of all persons having an interest in the property. The owner is not bound by merely stating the name of the lessee,¹⁷ unless upon the exercise of diligence the owner's name is still unknown.¹⁸ The name of the person must be stated with a sufficient degree of certainty to show from the statement, who is meant.¹⁹ In determining whether or not the name of the owner is sufficiently designated all the facts in the statement are to be considered.²⁰ The importance of having a correct name given is manifest from the fact that notice is generally given to third parties by means of indexes.²¹ Unless some reasonable excuse can be shown, no estate can be bound unless the lien statement contains a proper allegation of the owner's name.²² Generally a palpably erroneous

¹⁵ *Cornell v. Matthews*, 3 Dutch (N. J. L.) 522.

¹⁶ *Ross v. Simon*, 16 Daly (N. Y.) 159, 9 N. Y. Supp. 536; *Thomas v. Smith*, 42 Pa. 68.

¹⁷ *De Klyn v. Simpson*, 34 App. Div. (N. Y.) 436, 54 N. Y. Supp. 345.

¹⁸ *Grippen v. Weed*, 22 App. Div. (N. Y.) 593, 48 N. Y. Supp. 112.

¹⁹ *Kansas*. — *Deatherage v. Woods*, 37 Kan. 59, 14 Pac. 474.

New Mexico. — *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481.

Pennsylvania. — *Scott v. Sanderling*, 7 Leg. Int. (Pa.) 42.

Texas. — *Whiteselle v. Texas Loan Agency*, (Tex.) 27 S. W. 309.

Washington. — *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327. Under Hill's Code, § 3673, requiring the name of the owner of a building

sought to be charged to be given, a statement that claimants furnished materials to be used in a building for H. on land owned by him is sufficient. *Curtis v. Sestanovich*, 26 Ore. 107, 37 Pac. 67.

²⁰ *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

²¹ *Thomas v. Smith*, 42 Pa. 68.

²² *Grippen v. Weed*, 22 App. Div. (N. Y.) 593, 18 N. Y. Supp. 112. Where it is required that a lien notice shall contain "the name of the owner" a description of the parties at the head of the notice as follows: "W. and M., Subcontractors, versus B., Contractor, and M., Owner,"—is not such a direct allegation of the owner's name as the statute contemplates. *White v. Mullins*, 2 Idaho 1164, 31 Pac. 801.

or frivolous statement will not defeat the lien.²³ If the proper name is given, it will be sufficient although the property stands on the records in the name of another, where no innocent person is misled thereby.²⁴

§ 107. **Claim or statement—Peculiar ownership.**—Since married women have generally been given the rights of a feme sole, the ownership of the woman must be shown with the same degree of certainty as if she were a man.¹ Sometimes it has been held sufficient where an averment of reputed ownership is allowed and the husband is the authorized agent of the wife, to give the name of the husband as the reputed owner.² Under a statutory provision that a failure to state the name of the true owner shall not impair the validity of the

²³ *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873. In a Minnesota case, however, a strict rule was followed in holding that if it was stated, that J. owned the S. half and M. the N. half, and that J. made the contract on behalf of himself and M., when in fact J. owned all, it was insufficient. This seems too technical. *Conter v. Farrington*, 46 Minn. 336, 48 N. W. 1134. So, too, where it was alleged that a building was situated on the lot owned by defendant, it was held insufficient. *Morrison v. Philippi*, 35 Minn. 192, 28 N. W. 239; *Knabb's Appeal*, 10 Pa. St. 186, 51 Am. Dec. 472.

²⁴ *McHugh v. Slack*, 11 Wash. 370, 39 Pac. 674; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325.

¹ *Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177; *Reece v. Haymaker*, 25 Pittsb. Leg. J. (Pa.) 74; *Bolster v. Stocks*, 13 Wash. 460, 43

Pac. 532, 534, 1099; *Sagmeister v. Foss*, 4 Wash. 320, 39 Pac. 80, 744. **Community Property.** — A notice of a lien against community property, which only names the husband as owner, is sufficient, where the notice does not show on its face that it was community property. *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161.

² *Dennis v. Walsh*, 41 N. Y. St. 103, 16 N. Y. Supp. 257. The code provides that a notice of mechanic's lien shall contain the name and the nature of the title of the person who caused the improvement to be made. Where there was evidence tending to show that plaintiff was justified in assuming that the property was owned by the husband, the fact that he alleges that the husband was the reputed owner and that the wife claimed some interest in the property, will not defeat his right to a lien, though

lien, the wife may be held if the name of her husband is given.³ Where the lien is allowed upon the building separate from the land, it has been held that an allegation of her ownership in the building is not sufficient to include the land.⁴ This seems to be rather a technical holding. As to whose name shall be given, where the owner is deceased, there is some contrariety of opinion, one court holding that a statement of the name of the owner, as the "estate of M. R. deceased," was sufficient.⁵ Many of the statutes make provision as to what shall be done in case of the death of the owner, and it would seem that in the absence of such provision it would be properly stated if it was against the estate of the deceased person, as the claim is of that character that it should be settled by the administrator of the estate, and would be a lien prior to any interest of the heir. If the owners are a corporation, then that name should be given; if it is merely an association, then the individuals composing the association, either by their associate name or any other manner that would reasonably identify the property sought to be held.⁶ If the property is held by joint tenants, the names of all should be given.⁷ If the property is held under an executory contract, it should set out this fact, and the statement give the name of the record owner as well as the

the property belonged to the wife. *Santa Cruz Rock-Pavement Co. v. Lyons*, 133 Cal. 114, 65 Pac. 329.

³ *Walkam v. Henry*, 7 Misc. (N. Y.) 532, 27 N. Y. Supp. 997.

⁴ *Shannon v. Shultz*, 87 Pa. St. 481.

⁵ *Reece v. Haymaker*, 25 Pittsb. Leg. J. (Pa.) 74. Another court held the same way, but under a statute that did not require the name of the owner to be set out. *Welsh v. McGrath*, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638.

⁶ *Arata v. Tellurium Gold, &c., Min. Co.*, 65 Cal. 340, 4 Pac. 195; *Beals v. Congregation B'nai Jeshurun* 1 E. D. Smith (N. Y.) 654.

⁷ Where a statute requires a lien claim to state "the name of the owner or reputed owner if known," a claim which states that it was to be paid by "J. L., who was and still is the reputed owner" of the land, and that J. L. and M. L. are the reputed owners of the building on which the claim rests is sufficient. *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac.

purchaser.⁸ But as a protection against third parties, the statement should always contain the name of the record owner.⁹ As between the original parties, the statement will be good if it contains the name of the person who is in possession under an executory contract.¹⁰ Unless the statement contains the name of the purchaser it is doubtful whether his interest will be held.¹¹ Where the statute requires the name of the owner to be stated, and the statute likewise makes the owner liable for the improvements made by a lessee, the statement is void unless it contains the name of the lessor owner, so far as it may affect his interest.¹² A better way is to give the names of both the lessor owner and the lessee, and the facts under which the claim is asserted.¹³ Where property is transferred

775; *Drew Glass Co. v. Eagle Mill Co.*, 1 Kan. App. 614, 42 Pac. 387.

⁸ *Kealey v. Murray*, 15 N. Y. Supp. 403, 61 Hun (N. Y.) 619 (without opinion).

⁹ *Packard v. Sugarman*, 31 Misc. (N. Y.) 623, 66 N. Y. Supp. 30.

¹⁰ *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407. So held where deed was held in escrow. *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989.

¹¹ *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991.

¹² *De Klyn v. Gould*, 165 N. Y. 282, 31 Civ. Proc. (N. Y.) 223, 59 N. E. 95, 80 Am. St. 719, (N. Y.); *Jones v. Crumb*, 53 Hun. 631, 6 N. Y. Supp. 338; *Hankinson v. Riker*, 10 Misc. (N. Y.) 185, 30 N. Y. Supp. 1046. A notice of mechanic's lien, which states merely the lease of the ground to a certain person, on which is the building sought to be charged, and

after description of building and ground, and mention of the owner of the ground, declares the person first named lessee of "said property," does not show, either directly or by necessary inference, who is the owner of the building, and is not, therefore, within the requirement of Hill's Code, § 3873. *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287.

¹³ A notice of lien claim, alleging that the name of the owner of the property is J., and that one S. is owner of the ground on which the property is located, and setting forth a leasehold interest in J., sufficiently complies with the statutory requirement that the notice shall give the name of the reputed owner of the premises, though S. is not the owner of the land. *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308, 39 Pac. 815. Under the New York statutes which provide that a failure to give the correct name

during the time that the work is performed, it is generally held that the lien statement is sufficient if the name of the person is given who owns the property when the statement is filed.¹⁴ And under some statutes it is held that if the statement contains the name of the person who owned the land at the time the contract was made, or the name of the person at the time the statement is filed, it is sufficient.¹⁵ Under the Pennsylvania statutes, it is held that the name of the person who holds the legal title at the time the work is commenced is the proper one to be given in the statement.¹⁶

§ 108. Claim or statement—Description of services or material.—As the mechanics' lien rests upon the doctrine that the labor or materials having gone into the building, that the building should be held to pay for the same, it naturally follows, that the lien statement should in some manner show that the material or labor was or was to be furnished or expended upon the property described.¹ And this fact is determined from

will not invalidate the lien, if a wrong name is given the lien will not be impaired. *Steeves v. Sinclair*, 171 N. Y. 676, 64 N. E. 1125.

¹⁴ **California.**—*Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

Massachusetts.—*Amidon v. Benjamin*, 128 Mass. 534.

New Jersey.—*Derrickson v. Edwards*, 5 Dutch. (N. J. L.) 468, 80 Am. Dec. 220; *Edwards v. Derrickson*, 4 Dutch. (N. J. L.) 39.

Oregon.—*Willamette Steam Mills &c. Co. v. McLeod*, 27 Ore. 272, 40 Pac. 93. Where a grantor of mortgaged property conveyed it to a judgment creditor by deed absolute on its face, but in fact a mortgage, the fact that a second lien on the property, styling

the grantee in the deed as owner, after having filed a lien in which the grantor was named as owner did not impair the rights under the first lien. *Kerrigan v. Fielding*, 47 App. Div. (N. Y.) 246, 62 N. Y. Supp. 115.

¹⁵ *Ah Louis v. Harwood*, 140 Cal. 500, 74 Pac. 41; *Kelly v. Lemberger*, (Cal.), 46 Pac. 9; *Finlayson v. Biebighauser*, 51 Minn. 202, 53 N. W. 362.

¹⁶ *Fourth Avenue Baptist Church v. Schreiner*, 88 Pa. St. 124; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257. Or contracted for. *Wagner v. Manbeck*, 18 Pa. Co. Ct. 471.

¹ **Illinois.**—*Orr &c. Hardware Co. v. Needham Co.*, 62 Ill. App. 152.

the averments contained in the statement itself.² The statute should be followed³ by at least a substantial compliance with its requirements.⁴ Generally between the contractor and the owner,⁵ or his agent, it is not necessary to aver in the statement that the material was actually used in the building,⁶ but as between the subcontractor and owner, the statement should contain such an averment,⁷ as well as the kind and quantity of material or work.⁸ Failure to do so has been held to make the statement defective.⁹ Under some statutes a minute description of materials is not required.¹⁰ It is not essential in the subcontractor's or contractor's statement, to aver that he

Missouri.—*O'Shea v. O'Shea*, 91 Mo. App. 221; *Fathman & Co. Planing Mill Co. v. Ritter*, 33 Mo. App. 404; *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

Pennsylvania.—*Singerly v. Cawley*, 26 Pa. St. 248. The statement must show whether the claim is for work or materials. *Robinson v. Davis*, 8 Del. Co. Ct. (Pa.) 237; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74; *Canton Roll & Mach. Co. v. Rolling Mill Co.* 155 Fed. 321; *Norton & Co. Contracting Co. v. Unique Const. Co.*, 121 App. Div. (N. Y.) 585, 106 N. Y. Supp. 372; Stating that it is for "outside work on house and painting of inside blinds," is sufficient to support a lien. *Porteous Decorative Co. v. Fee*, 29 Nev. 375, 91 Pac. 135.

² *Knelly v. Horwath*, 208 Pa. 487, 57 Atl. 957; *Rowen v. Alladio*, — Ore. —, 93 Pac. 929; *Warren v. Johnston*, 33 Pa. Super. Ct. 617.

³ *Greene v. Ely*, 2 G. Greene, (Iowa) 508.

⁴ *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1092; *Withrow Lumber Co. v. Glasgow Inv. Co.*, 101 Fed. 863, 42 C. C. A. 61.

⁵ *Vogel v. Luitwieler*, 52 Hun (N. Y.) 184, 5 N. Y. Supp. 154.

⁶ *Harnish v. Herr*, 98 Pa. St. 6.

⁷ *Kling v. Railway Const. Co.*, 7 Mo. App. 410; *Russell v. Bell*, 44 Pa. St. 47.

⁸ *Russell v. Bell*, 44 Pa. St. 47; *Singerly v. Cawley*, 26 Pa. St. 248; *Lynch v. Feigle*, 11 Phila. (Pa.) 247, 33 Leg. Int. (Pa.) 408; *Lauman's Appeal*, 8 Pa. St. 473; *Noll v. Swineford*, 6 Pa. St. 187.

⁹ *In re Wells' Estate*, 2 Del. Co. Ct. (Pa.) 172. The entire statement is used to determine this fact. *American Car & Co. v. Alexandria Water Co.*, 215 Pa. 520, 64 Atl. 683.

¹⁰ *Davis v. Livingston*, 29 Cal. 283. The requirement that a claim for mechanics' liens shall set out the number of days of labor performed or furnished (St. Mass. 1872, c. 318, § 2) does not apply to a claim arising from a contract for labor only. *Patrick*

had paid for the materials,¹¹ but it is generally necessary to aver that the materials were furnished for,¹² or on account of,¹³ or were actually used in the building; not to do so is fatal,¹⁴ and cannot be cured by a verdict based on testimony showing such facts.¹⁵ Where there are several buildings erected under one contract, especially as between the original parties, it is not necessary to specifically state what went into each building.¹⁶

§ 109. **Claim or statement—Sufficient description of materials.**—The statement should so describe the labor and materials as to enable the owner to determine the reasonableness, and the good faith of the same.¹ If the statute prescribes a form, it should be followed,² but in the absence of such statutory requirement, a statement made in the way that the trade usually makes such statements, will be sufficient.³ Where the contract is entire, merely giving the contract price and the en-

v. Smith, 120 Mass. 510. "For work and labor done and materials furnished in the erection and construction of said house" is sufficiently specific. *Siegmund v. Kellogg-Mackay-Cameron Co.*, 38 Ind. App. 95, 77 N. E. 396.

¹¹ *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367.

¹² *Smith v. Bally*, 8 Daly (N. Y.) 128; *Nottingham v. McKendrick*, 38 Ore. 495, 57 Pac. 195, 63 Pac. 322; *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54; *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316.

¹³ *Lee v. Exeter Club*, 9 Kulp, (Pa.) 209.

¹⁴ *Hill v. Ryan*, 54 Ind. 118; *Bouchard v. Gnisti*, 22 R. I. 591, 48 Atl. 934; *Barton v. Rose*, 48 Ore. 235, 85 Pac. 1009.

¹⁵ *Fathman &c. Planing Mill Co. v. Ritter*, 33 Mo. App. 404. Under some statutes, such averment is not required, however. *Neihaus v. Morgan*, (Cal.) 45 Pac. 255.

¹⁶ *White v. Livingston*, 69 App. Div. (N. Y.) 361, 75 N. Y. Supp. 466; *Mitchell Planing Mill Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. 544.

¹ *Tacoma Lumber & Mfg. Co. v. Kennedy* 4 Wash. 305, 30 Pac. 79; *Tacoma Lumber & Mfg. Co. v. Wilson*, 3 Wash. 786, 29 Pac. 829; *Warren v. Quade*, 3 Wash. St. 750, 29 Pac. 827. See Dec. & Am. Dig tit. Mechanics' Liens, § 139.

² *Clark v. Schatz*, 24 Minn. 300.

³ *Wetmore v. Marsh*, 81 Iowa 677, 47 N. W. 1021.

tire amount of materials furnished, not specifying each article,⁴ or where the work is by the hour, the number of hours and dates with the price per hour,⁵ even if it fails to allege in express terms that the work was furnished by the claimant,⁶ or where materials were furnished, but the kind is not mentioned, will be sufficient.⁷ A substantial compliance with the statute, is all that is required.⁸ If the contract cannot be completed because of the insolvency of the owner, the statement should show what part of the materials are to be furnished and what have already been furnished.⁹ Statements containing a mere designation of the last item,¹⁰ or an averment as to so

⁴ **Maine.**—Wescott v. Bunker, 83 Me. 499, 22 Atl. 388.

Maryland.—Maryland Brick Co. v. Dunkerly, 85 Md. 199, 36 Atl. 761; Gunther v. Bennett, 72 Md. 384, 19 Atl. 1048.

Minnesota.—Knight v. Norris, 13 Minn. 473.

Pennsylvania.—Brown v. Meyers, 145 Pa. St. 17, 23 Atl. 254, 29 W. N. C. (Pa.) 393.

Washington.—Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. 789. A notice filed by a subcontractor stated that the labor performed and materials furnished were "plumbing, tinning, furnaces and ranges, as per contract, to the amount of \$2,560, and additional labor to the sum of \$77, making in all \$2,637, upon account of which there has been paid \$850, and leaving a balance due therefor for \$1,787," sufficiently states the labor performed and the materials furnished and the agreed price, or value thereof. Clarke v. Heylman, 80 App. Div. (N. Y.) 572; 80 N. Y. Supp. 794.

⁵ Steininger v. Raeman, 28 Mo. App. 594.

⁶ Sickman v. Wollett, 31 Colo. 58, 71 Pac. 1107.

⁷ Benore v. Leonard, 6 Lack. Leg. N. (Pa.) 198; McClain v. Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; Maynard v. Ivey, 21 Nev. 241, 29 Pac. 1090.

⁸ Pue v. Hetzell, 16 Md. 539.

⁹ Lewin v. Whittenton Mills, 13 Gray (Mass.) 100. Plaintiff performed part of certain work contracted for, and, having abandoned the contract on account of defendant's default, filed a lien for the work done, stating "that all the work and materials for which the claim is made has been actually performed or furnished." is a sufficient compliance with the statute requiring that the notice of lien shall contain a statement of the work, performed and unperformed. Bulkley v. Kimball, 46 N. Y. St. 543, 19 N. Y. Supp. 672.

¹⁰ Lynch v. Feigle, 11 Phila. (Pa.) 247, 33 Leg. Int. (Pa.) 408.

many feet of lumber, "third common,"¹¹ or materials furnished, on 2nd, 3rd, 4th, and 5th of February, 1847,¹² or "an excavation for a barn hereinafter described," and no further description is given, have been held to be insufficient.¹³ Under the Pennsylvania statute a statement must show whether the work was done on a repair,¹⁴ alteration,¹⁵ or construction of a new building.¹⁶ A statement that the party agreed to furnish certain windows and doors,¹⁷ or a bill of merchandise,¹⁸ or lumber for a certain hotel,¹⁹ or "certain goods, wares and merchandise,"²⁰ or that goods are "to be furnished or are furnished" being in the alternative,²¹ or in which it is merely stated that labor was performed and the agreed price averred as being partly oral and partly written,²² or for labor performed and materials as per contract, where contract is not stated,²³ or which fails to definitely set forth the date or kind of material,²⁴ or designates the material as "Red" and "Hard" without further description,²⁵ are held to be insufficient de-

¹¹ *Ferguson v. Vollum*, 1 Phila. (Pa.) 181.

¹² *Heron v. Robinson*, 2 Pars. Eq. Cas. (Pa.) 248.

¹³ *McNamee v. Hilderburn*, 9 Pa. Co. Ct. 267.

¹⁴ *Wharton v. Real-Estate Inv. Co.* 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. 629, 40 W. N. C. (Pa.) 33.

¹⁵ *Morrison v. Henderson*, 126 Pa. St. 216, 17 Atl. 599, 24 W. N. C. (Pa.) 38.

¹⁶ *Wetmore's Appeal* 91 Pa. St. 276.

¹⁷ *Tacoma Lumber & Mfg. Co. v. Wolf*, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462.

¹⁸ *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729.

¹⁹ *United States Savings, &c.*

Co. v. Jones, 9 Wash. 434, 37 Pac. 666.

²⁰ *Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 532, 534, 1099.

²¹ *New Jersey Steel &c. Co. v. Robinson*, 85 App. Div. (N. Y.) 512, 83 N. Y. Supp. 450.

²² *Toop v. Smith*, 87 App. Div. (N. Y.) 241, 84 N. Y. Supp. 326.

²³ *Withrow Lumber Co. v. Glasgow Inv. Co.*, 101 Fed. 863, 42 C. C. A. 61.

²⁴ *Wolfe v. Keeley*, 9 Pa. Dist. 515.

²⁵ *Dwyer Brick Works v. Flanagan*, 87 Mo. App. 340.

Instances.—A notice does not state the nature and amount of labor and materials furnished where it merely recites: "Labor and materials furnished under

scriptions. A mere discrepancy,²⁶ or inclusion of non-liable items,²⁷ unless done with fraudulent intent, will not invali-

written contracts during the months of May, June, July, August, and September, 1892, and to be hereafter furnished to complete the building, the sum of eighty-five hundred dollars (\$8,500) is due," and "the sum of five hundred dollars is due for extra work furnished and materials supplied under a verbal agreement during the same period." *McKinney v. White*, 162 N. Y. 601, 57 N. E. 1116. Under Laws 1897, p. 518, c. 418, § 9, providing that a notice of mechanic's lien shall state the labor performed or to be performed, or materials furnished or to be furnished, and the agreed price and value thereof, and the amount unpaid for such labor or materials, a statement in a notice of mechanic's lien that "the labor performed and the materials furnished and to be furnished consists of wainscoting," etc., and the agreed price, "less the amount allowed for material," and that the amount unpaid "for such labor (or) (and) material is" a certain sum, creates no lien, as it cannot be determined whether the claim is for labor performed and material furnished, or for labor to be performed and materials to be furnished. *Bossert v. Happel*, 40 Misc. (N. Y.) 569, 82 N. Y. Supp. 872. Where materials furnished by a mechanic's lien claimant was furnished partly for, and partly used for, sidewalks, and

claimants fail to show what portion went for sidewalks, and what portion for other purposes, the claim is wholly bad, since it cannot be determined what portion of it is valid. *Bradley Co. v. Gaghan*, 208 Pa. St. 511, 57 Atl. 985; *Endy v. Ogrydziak*, 10 Kulp (Pa.) 102.

Contract entirety. — Code Va. 1887, § 2476, provides that, to perfect a lien, a contractor must file "an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due." An account for \$12,000, for "labor performed and materials furnished" between certain dates, in the construction of a certain building "as per contract," was insufficient to create a lien, where the erection of the building was contracted for as an entirety, and the contract price was \$17,945. *Breed v. Glasgow Inv. Co.*, 92 Fed. 760.

²⁶ *Kasper v. St. Louis Terminal R. Co.*, 101 Mo. App. 323, 74 S. W. 145; *Ogden v. Alexander*, 140 N. Y. 356, 35 N. E. 638; *Buess v. Paul B. Pugh & Co.*, 46 Misc. (N. Y.) 414, 92 N. Y. Supp. 359; *Francis v. Wernwag*, 12 Montg. Co. Law Rep'r, 104, 2 Lack. Leg. N. (Pa.) 164.

²⁷ *Palmer v. McGinness*, 127 Iowa 118, 102 N. W. 802; *Wescott v. Bunker*, 83 Me. 499, 22 Atl. 388; *Title Guarantee & Trust Co. v.*

date the lien.²⁸ Extra work,²⁹ and repairs during process of construction, may be included in the statement with the remainder furnished.³⁰

§ 110. **Claim or statement—Averment of contract or consent of owner.**—The statement must in some manner,¹ show that the material was furnished or work done by the agreement or consent of the owner; if it does not, it is fatally defective.² But the contract need not be stated, verbatim,³ nor with greater fullness than is required in a pleading.⁴ The statement should neither set out matters which properly be-

Wrenn, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454.

²⁸ *Close v. Clark*, 16 Daly (N. Y.) 91, 9 N. Y. Supp. 538.

²⁹ *Brown v. Kolb*, 8 Pa. Super. Ct. 413, 43 W. N. C. (Pa.) 26;

³⁰ *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

¹ The docket kept by the clerk, will not dispense with a statement showing the amount of each particular kind of mason work done under a contract fixing a distinct price for each kind. *Ehlin v. Murphy*, 170 Ill. 399, 48 N. E. 956. A notice that defendant and others were the original contractors, and had a contract to construct a building for H., sufficiently states that the contract was made with H. *Curtis v. Sestanovich*, 26 Ore. 107, 37 Pac. 67; *Moritz v. Splitt*, 55 Wis. 441, 13 N. W. 555. See *Dec & Am. Dig tit, Mechanics' Liens* § 140.

² See §§ 23, 26.

Minnesota.—*Anderson v. Knudsen*, 33 Min. 172, 22 N. W. 302; *Keller v. Houlhan*, 32 Minn. 486, 21 N. W. 729; *Rugg v. Hoover*, 28 Minn. 404, 10 N. W. 473; *O'Neill v.*

St. Olaf's School, 26 Minn. 329, 4 N. W. 47.

Oregon.—*Cross v. Tscharnig*, 27 Ore. 49, 39 Pac. 540.

Pennsylvania.—*Fenner v. Real Estate Trust Co.* 13 Pa. Dist. 47; 29 Co. Ct. (Pa.) 329. An averment in a petition to perfect a mechanic's lien, under Rev. St. Ohio 3184, stating "that under a certain verbal contract with the said principal contractor (who at the time of ordering said materials was an agent and contractor of said owner)," is insufficient to satisfy the requirements of the statute which provide that such contract must be entered into by the owner of his "authorized" agent. *McCune v. Snider*, 9 Ohio Cir. Dec. 572. A mere allegation that plaintiffs erected the structure at the instance of one who was in possession of the land under a contract to purchase with the owners is insufficient. *Russell v. Hayner*, 130 Fed. 90.

³ *Hurlbert v. New Ulm Basket-Works*, 47 Minn. 81, 49 N. W. 521.

⁴ *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

long in the pleading,⁵ nor implications of law.⁶ If the statute prescribes a form and the form does not provide for setting out the contractual relation, it is sufficient to follow the form.⁷ In states where the common law disabilities of married women have not been removed, statements will be required to show how the party if a married woman is to be charged.⁸ It is not necessary to state that the contract has been performed, unless the right to a lien rests upon that fact.⁹ Unless the statute requires exact statements,¹⁰ unintentional mis-statements, where no one is misled thereby, will not avoid the lien.¹¹ If extra work or materials are furnished, the statement should contain

⁵ *Burkitt v. Harper*, 79 N. Y. 273; *Osborn v. Logus*, 28 Ore. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

⁶ *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139; *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347; *Wagner v. Manbeck*, 18 Pa. Co. Ct. 471.

⁷ *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001.

⁸ A mechanic's lien against a married woman must show on its face that she is a married woman; that the work or materials were necessary for the improvement or repair of her separate estate, and were in fact so applied; and that the erection or repair of the building took place with her consent or authority, or at her request. *Wolfe v. Oxnard*, 152 Pa. St. 623, 25 Atl. 806; *Allen v. Oxnard*, 152 Pa. St. 621, 25 Atl. 568; *Dearie v. Martin*, 78 Pa. St. 55.

New York.—*Hauptman v. Catlin*, 20 N. Y. 247.

Pennsylvania.—*Kelly v. McGehee*, 137 Pa. St. 443, 20 Atl. 623, 26 W. N. C. (Pa.) 493; *Loomis v. Fry*, 91 Pa. St. 396; *Lloyd v. Hibbs*, 81 Pa. St. 306; *Duck v. O'Rourke*, 19 W. N. C. (Pa.) 497; *Flinn v. Graff*, 2 Pa. Co. Ct. (Pa.) 533; *Shannon v. Broadbent*, 2 Pa. Dist. 220. So it was held that a lien setting forth a joint contract by a married woman and her husband, was void. *Davis v. Nary*, 2 Leg. Rec. (Pa.) 326.

⁹ *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139; *Harmon v. Ashmead*, 68 Cal. 321, 9 Pac. 183; *Ford v. Wilson*, 85 Ga. 109, 11 S. E. 559.

¹⁰ *New York*.—*Ogden v. Alexander*, 140 N. Y. 356, 35 N. E. 638; *Foster v. Schneider*, 50 Hun (N. Y.) 151, 2 N. Y. Supp. 875; *Mull v. Jones*, 18 N. Y. Supp. 359, 45 N. Y. St. 643; *Brandt v. Verdon*, 18 N. Y. Supp. 119, 44 N. Y. St. 885.

Federal.—*In re Emslie*, 102 Fed. 291, 42 C. C. A. 350.

¹¹ *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175.

the same averments in reference to such work and materials as is required for materials and labor furnished under the principal contract.¹² Where the contract provides that extras shall be furnished at a certain price, though they may be included in the statement for materials furnished under the principal contract, yet the items should be separately specified.¹³ As before mentioned, it is not ordinarily necessary to set out the contract verbatim or annex the same to the statement,¹⁴ unless the statute so provides, in which event the statement will be invalid, if it does not follow the statute.¹⁵

§ 111. **Claim or statement—terms of contract.**—Just how much of the terms of the contract must be set out in the statement, of necessity depends largely upon the wording of the statute. The statement must, however, in all cases show that

¹² *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422; *Knelly v. Horwath*, 208 Pa. 487, 57 Atl. 957.

¹³ *Bruns v. Braun*, 35 Mo. App. 337; *Smith v. Gilmore*, 34 W. N. C. (Pa.) 128. In a notice claiming a mechanic's lien for work under a contract and for extra work, the lienor, after particularly describing the work under the contract, stated that he performed certain extra work in and about the building and premises aforesaid, and furnished certain materials therefor, of the reasonable value. Held, that this sufficiently specified the nature of the extra work, as required by the lien law. *Hunter v. Walter*, 58 Hun (N. Y.) 607, 12 N. Y. Supp. 60. Where principal contract is not recorded etc.; *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801.

¹⁴ *Garlichs v. Donnelly*, 42 Neb. 57, 60 N. W. 323; *Pool v. Wede-*

meyer, 56 Tex. 287; *Barnacle v. Henderson*, 42 Neb. 169, 60 N. W. 382.

¹⁵ Third persons taking place of a contractor under a written contract, does not operate under a written contract as to material furnished the contractor prior to the change. *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65. The submission of a written bid and oral acceptance, is not a written contract. *Specht v. Stevens*, 46 Neb. 874, 65 N. W. 879. Where in a building contract plans and specifications are referred to as part of the contract, a lien filed under the contract and not containing a copy of the plans and specifications, is defective under Pennsylvania Act June 4, 1901, and will be stricken off. *Knelly v. Horwath*, 27 Pa. Co. Ct. 545 *affd.* 208 Pa. St. 487.

there was a contract, express or implied, that it has been performed,¹ and there is an indebtedness.² In this respect a substantial compliance is all that is required.³ Thus a statement that it was agreed that the price on all materials should be due on delivery was held sufficient as to time,⁴ where the statute did not expressly require a statement as to time.⁵ So the statement was held sufficient where it averred the terms of the payment as "cash on completion of contract,"⁶ and likewise where the averment gave the time as "about July 2d," when it was in fact June 29th,⁷ or "June 30th," when it should have been "June 28th," no one being misled.⁸ A statutory requirement that the statement must set forth the entire price of the

¹ *Pacific Mut. Life Ins. Co. v. Fisher*, 109 Cal. 566, 42 Pac. 154; *Schroth v. Black*, 50 Ill. App. 168; *Springer Land Assn. v. Ford*, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. 170; *American Car & Foundry Co. v. Alexandria Water Co.*, 215 Pa. 520, 64 Atl. 683. See Dec. & Am. Dig. tit. Mechanics' Liens, § 142.

² *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

³ *Felgenhauer v. Haas*, 123 App. Div. (N. Y.) 75, 108 N. Y. S. 476; *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; *Snell V. Payne*, 115 Cal. 218, 46 Pac. 1069; *Mras v. Duff*, 11 Wash. 36, 39 Pac. 267. Cal. Code Civ. Proc. 1187, provides that notice of a claim for a mechanic's lien shall contain a statement of the "terms, time given, and conditions of the contract." A claimant to such a lien for the construction of a house filed his notice, stating "that such house was to be erected, to consist of five rooms, and to be finished in a workman-

like manner, for the agreed price of \$740." Held, a sufficient compliance with the Code to entitle claimant to his lien. *McGinty v. Morgan*, 122 Cal. 103, 54 Pac. 392.

A notice of claim for a mechanic's lien which states that under the contract the claimant was "to furnish the lumber, sash, doors, etc.," for a certain building, is sufficiently specific. *Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 532, 534, 1099. Immaterial facts need not be stated. *Martin v. Flahive*, 112 App. Div. (N. Y.) 347, 98 N. Y. S. 577; *American Car & Foundry Co. v. Alexandria Water Co.*, 215 Pa. 520, 64 Atl. 683.

⁴ *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643.

⁵ *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Hills v. Ohlig*, 63 Cal. 104.

⁶ *Kelley v. Plover*, 103 Cal. 35, 36 Pac. 1020.

⁷ *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422.

⁸ *Mitchell v. Penfield*, 8 Kan. 186.

contract must be followed, although an action would lie on a quantum meruit.⁹ A failure to comply with a plain statutory requirement as to matters to be included in the statement is fatal.¹⁰ If there are no special terms or conditions in the contract then a general averment will be sufficient, and no special matters need be set out.¹¹ Where the contract is filed with the statement and made a part of it, then no averment of time

⁹Under Pub. St. Mass. c. 191, § 6, which required that a person claiming a lien for labor shall file a statement of the amount due him, and, "If the lien is claimed only for labor, performed or furnished under an entire contract, which includes both labor and materials at an entire price, the contract price, the number of days of labor performed or furnished, and the value of the same, shall also be stated" a statement which avers that the labor was furnished under a contract, "the contract price being three dollars per square for excavation, and two dollars and fifty cents per perch for laying the stone, cement to be furnished by me," and which states the number of days' labor furnished, and the value of the labor, is insufficient, as it does not show the contract price of the entire work. *Hurley v. Lally*, 151 Mass. 129, 23 N. E. 834; *Gogin v. Walsh*, 124 Mass. 516.

¹⁰*French v. Hussey*, 159 Mass. 206, 34 N. E. 362; *Pierce v. Cabot*, 159 Mass. 202, 34 N. E. 362; *Dugan v. Brophy*, 55 How. Pr. (N. Y.) 121. Did not set out plans when statute required. *Pierce v. Birkholm*, 115 Cal. 657, 47 Pac.

681. A claim which fails to set forth a copy of the contract, if in writing, or a statement of its terms and conditions, if verbal, and the kind of materials furnished, whether the claim is against the fee or a lesser estate, and the sum claimed to be still due and whether claimant has any note or other security for his claim, is so informal and defective, under the Act of June 4, 1901, that it will be stricken off, unless amended. *Billmeyer & Co. v. Brubaker*, 17 York, (Pa.) 113, 115. Terms, time given and conditions. *Morrison v. Willard*, 17 Utah 306, 53 Pac. 832, 70 Am. St. 784; *Gates v. Brown*, 1 Wash. St. 470, 25 Pac. 914.

¹¹*Watkins v. Bugge*, 56 Neb. 615, 77 N. W. 83; *Lonkey v. Wells*, 16 Nev. 271; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729. A mechanic's lien claim, which states in general terms that the conditions of the contract were the furnishing of materials and labor by plaintiff, and the payment of a specified sum by the owner on completion and acceptance of the building, is sufficient. *Branham v. Nye*, 9 Colo. App. 19, 47 Pac. 402.

need be made if the contract covers the matter.¹² If the contract is required to be recorded, it may be referred to.¹³ The mere fact that the owner has a copy of the contract will not do away with the necessity of making the necessary statements.¹⁴ The terms of the contract must not be stated in the alternative.¹⁵ Under some statutes it is enough to set out a copy if the contract is in writing; if verbal that fact should be stated and its substance given.¹⁶ The proof on the trial must accord with the averments in the statement, or the variance will be fatal.¹⁷ As a general rule, subcontractors are not required to set out the terms of the contract between the owner and the principal contractor.¹⁸ Where a contract is referred to in the statement it is presumed to be the contract between the owner and principal contractor in the absence of any averment to the contrary.¹⁹

¹² *Ford v. Springer Land Assn.*, 8 N. Mex. 37, 41 Pac. 541. Bill of particulars. *Washington Mill Co. v. Craig*, 7 Wash. 556, 35 Pac. 413.

¹³ *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 Pac. 431; *O'Brien v. Logan*, 9 Pa. St. 97.

¹⁴ *United States Savings, &c., Co. v. Jones*, 9 Wash. 434, 37 Pac. 666.

¹⁵ *Villaume v. Kirchner*, 85 N. Y. Supp. 377.

¹⁶ *Benore v. Leonard*, 6 Lack. Leg. N. (Pa.) 198; *Westmoreland Guarantee Bldg. & Loan Assn. v. Conner*, 216 Pa. 543, 65 Atl. 1089.

¹⁷ *Baker v. Winter*, 15 Md. 1. Plaintiff's notice of lien set out that his agreement with defendant N. was "that he was to be paid for said labor done and furnished at what it was reasonably worth, to be paid for when the work

ceased." On the trial plaintiff testified: "My contract was to furnish all the material and do all the painting for \$250." Held, that the variance between the actual contract and the statement in the notice was fatal. *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426. Where the specification claims a lien under a contract to paint a house for \$180, and the proof shows a contract to paint a house and the fence on the lot for \$180, there is no lien. *Jones v. Kalker*, 1 Sheld. (N. Y. Super.) 350.

¹⁸ *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786; *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841; *Brubaker v. Bennett*, 19 Utah 401, 57 Pac. 170.

¹⁹ *Dunns v. Cutter*, 19 Pa. Co. Ct. 24, 6 Pa. Dist. 666, 28 Pittsb. Leg. J. (Pa.) 189.

§ 112. **Claim or statement—name of employer or contractor.**
 —As a general rule it may be stated that it is necessary that the lien statement shall contain the name of the employer where it is sought to have a direct lien, and the name of the contractor where a subcontractor seeks to enforce his lien rights.¹ In some instances it has been held that a failure to make designation is not fatal unless objection is made before trial is had to enforce the lien.² If the giving of such name will add no additional information, its omission will be excused.⁴ If the contract is entered into by an agent, it will not be necessarily fatal to omit the name of the agent.⁵ If the lien statement is so indefinite that it cannot be determined who is to be charged, it will be void.⁶ But even if the name is not rightly given, and the party to be charged knows of his lia-

¹**California.**—*Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336.

Ontario.—*Wallis v. Skain*, 21 Ont. R. 532.

Oregon.—*Dillon v. Hart*, 25 Ore. 49, 34 Pac. 817.

Pennsylvania.—*Dagg v. Thomas*, 31 Pittsb. Leg. J. (N. S.) 210; *Whitman v. Wilkesbarre Deposit etc. Bank*, 9 Kulp (Pa.) 522.

Wisconsin.—*Scott v. Christianson*, 110 Wis. 164, 85 N. W. 653; *Bertheolet v. Parker*, 43 Wis. 551.

Under Code Civ. Proc. (Cal.) 1184, providing that "where a contract for labor for which a mechanic's lien is claimed is not filed, the labor should be deemed to have been performed at the personal instance of the owner," a lien was not objectionable because it named the owner as the person by whom the claimant was employed instead of the contractor. *McClain v. Hutton*, 131 Cal.

132, 63 Pac. 182. Especially is this true, where the lien statement is not made to secure a principal contractor. *Keller v. Houlihan*, 32 Minn. 486, 21 N. W. 729; *McCay's Appeal*, 37 Pa. St. 125. Where the contract has been changed. *Murta v. Stephenson*, 12 Pa. Co. Ct. R. 653. Must show to whom material furnished. *Barton v. Rose*, 84 Ore. 235, 85 Pac. 1009. See Dec & Am. Dig. tit, Mechanics' Liens, § 141.

²*Darrow v. Morgan*, 65 N. Y. 333.

⁴*Knabb's Appeal*, 10 Pa. St. 136, 51 Am. Dec. 472.

⁵*Stevenson v. Dick*, 13 Phila. (Pa.) 132. Made with husband as agent, not necessary to name him. *Ryman v. Wolf*, 6 Kulp. (Pa.) 325; *Fulton v. Parlett & Parlett*, 104 Md. 62, 64 Atl. 58.

⁶*Bradley, etc., Co. v. Pacheteau*, 71 App. Div. (N. Y.) 148, 75 N. Y. Supp. 531.

bility, and no one is misled thereby, the statement will be sufficient.⁷ Where the statement has it "M. & Co.," when it should be "M.,"⁸ or gives the name of three joint contractors,⁹ or "W. F. H.," when it should be "F. W. H.,"¹⁰ or H. & N.,¹¹ or the owner and his wife,¹² or of a "firm" when one member makes the contract,¹³ or the name of one partner in a partnership,¹⁴ or to "J. S. and F. S.," when it should be "J. S. and B. F. S.,"¹⁵ or "J. W. H. & Bro.," when it should be "C. N. H. & Co.,"¹⁶ or gives the name of the foreman or superintendent who actually did the employing, the statements have been held to be not fatally erroneous.¹⁷ If the name of the agent is given, the statement should show that he acts under the authority of

⁷*Brosnan v. Trulson*, 164 Mass. 410, 41 N. E. 660; *Brown v. Welch*, 5 Hun (N. Y.) 582; *Nottingham v. McKendrick*, 38 Ore. 495, 63 Pac. 822; *Sautter v. McDonald*, 12 Wash. 27, 40 Pac. 418. A duly recorded notice of intention to claim a mechanic's lien, which states such intention, describes the property sought to be charged, and states the amount for which the lien is claimed, and that it is for the construction of heating apparatus in the building erected on the property described, is sufficient under Rev. St. 693, though the caption indicates that the contract was made with the trustees of the corporation owning the building, while it was in fact made with its agent. *Phoenix Iron Co. v. The Richmond*, 6 Mackey (D. C.) 180. Under Hill's Code (Ore.), § 3673, requiring the claimant to state the name of the person to whom he furnished the materials, the statement that claimants furnished brick, and that the ma-

terials were furnished to S., the contractor, and were used in the building, is sufficient. *Curtis v. Sestanovich*, 26 Ore. 107, 37 Pac. 67.

⁸*Tibbetts v. Moore*, 23 Cal. 208.

⁹*Davis v. Livingston*, 29 Cal. 283. Contractor and subcontractor. *McHugh v. Slack*, 11 Wash. 370, 39 Pac. 674.

¹⁰*Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

¹¹*Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

¹²*Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152.

¹³*First Presbyterian Church v. Santy*, 52 Kan. 462, 34 Pac. 974.

¹⁴*Pell v. Baur*, 41 N. Y. 99, 16 N. Y. Supp. 258.

¹⁵*Steinman v. Strimple*, 29 Mo. App. 478.

¹⁶*Osborn v. Logus*, 28 Ore. 302, 42 Pac. 997.

¹⁷*Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308, 39 Pac. 815.

the owner,¹⁸ and should show the owner's name, if the material is furnished to the agent under contract with the owner.¹⁹ In accordance with the principle that the person charged should be named in the statement, if the work is done for a lessee, and his interest is to be charged, the lessee's name should be given.²⁰ If the name is properly given, the fact that the materials were used by the contractor or that credit was originally given to the owner, and not to the contractor, will not affect the validity of the lien statement.²¹ While a statement need not in terms state the contractual relation of the parties,²² yet this will not excuse a failure to give their names.²³ And where a contractor files the statement, it may be good provided he names the parties with whom he made the contract, even though he omit to state that his contractor made a contract with the owner. This will give the owner all the information necessary to protect himself.²⁴ But elsewhere it is held that a failure to make a statement of such contract

¹⁸*Filberl v. Davis*, 2 Cleve. Law Rep. (Ohio) 265, 4 Ohio Dec. 496. Architect. *Leick v. Beers*, 28 Ore. 483, 43 Pac. 658. Husband and wife. *Ward v. Black*, 7 Phila. (Pa.) 342.

¹⁹*Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54.

²⁰*Carey v. Wintersteen*, 60 Pa. St. 395. May not be fatal if omitted. *Shields v. Sorg*, 129 Ill. App. 266. Judgment affirmed. *Sorg v. Crandall*, 233 Ill. 79, 84 N. W. 181.

²¹*Clark v. Huey*, 12 Ind. App. 224, 36 N. E. 52.

²²*Cunningham v. Barr*, 45 Kan. 158, 25 Pac. 583. A statement that the contract was made with B. as agent, when B. was in fact a sub-contractor is not sufficient.

Fiske v. Rogers, 60 N. Y. Super. Ct. 418, 18 N. Y. Supp. 191.

²³*Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Merriman v. Bartlett*, 34 Minn. 524, 26 N. W. 728; *Willamette Steam Mills, &c., Co. v. McLeod*, 27 Ore. 272, 40 Pac. 93; *Rowland v. Harmon*, 24 Ore. 529, 34 Pac. 357; *Rankin v. Malarkey*, 23 Ore. 593, 34 Pac. 816. A recital in a notice of lien filed by material men, that the contractor, as agent of the owner, ordered the material, sufficiently alleges the existence of the relation of principal and agent between the owner and contractor to subject the building to the lien. *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729.

²⁴*Cahill v. Ely*, 55 Mo. App. 102.

will be fatal.²⁵ Whatever the statutory requirements may be they must be complied with.²⁶

§ 113. Claim or statement—time of rendering services.—

The statement must show that the services have been rendered so as to bring the filing within the time limit, but no more is required than is demanded by a reasonable construction of the statute.¹ But whatever the statute demands must be given, and if the dates of items are required, it is fatal not to set forth such dates.² But if the statute does not require the dates to be given the statement will be good if it shows that the work was performed or the materials furnished within the time

²⁵ *Bertheolet v. Parker*, 43 Wis. 551.

²⁶ *Washington*.—*Sautter v. McDonald*, 12 Wash. 27, 40 Pac. 418; *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161; *Heald v. Holder*, 5 Wash. 677, 32 Pac. 728; *Tacoma Lumber, &c., Co. v. Wilson*, 3 Wash. 786, 29 Pac. 829; *Warren v. Quade*, 3 Wash. 786, 29 Pac. 827.

¹ *Mouat Lumber & Inv. Co. v. Freeman*, 7 Colo. App. 152, 42 Pac. 1040. Figures in a date column have a well-defined and universally understood meaning, both commercially and legally; and, where the month and the day and the year are so represented in a claim filed for a mechanic's lien, it will be held sufficient. *Sorg v. Crandall*, 129 Ill. App. 255. Judgment affirmed. *Lowden v. Sorg*, 233 Ill. 79, 84 N. E. 181.

² *Illinois*.—*Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39; *Grace v. Oakland Bldg. Assn.*, 63 Ill. App. 339; *Fried v. Blanchard*, 58 Ill. App. 622; *Shields v. Sorg*, 129 Ill.

App. 266, judgment affirmed (1906) *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181.

Missouri.—*Cahill v. Orphan School of Christian Church*, 1 Mo. App. Rep'r, 488, 63 Mo. App. 28.

New York.—*Mahley v. German Bank*, 174 N. Y. 499, 67 N. E. 117.

Pennsylvania.—*Brown v. Kolb*, 8 Pa. Super. Ct. 413, 43 W. N. C. (Pa.) 26; *Witman v. Walker*, 9 Watts & S. (Pa.) 183; *Noll v. Swineford*, 6 Pa. St. 187.

Federal.—*In re Emsile*, 98 Fed. 716. The necessity of setting out the dates of furnishing the material is not satisfied by a statement that the items were delivered between April 20, 1893, and July 19, 1893, nor by an averment in the affidavit that the demand accrued within four months prior to the filing of the lien. *Mitchell Planing-Mill Co. v. Allison*, 71 Mo. App. 251; See § 116. See Dec. & Am. Dig. tit Mechanics' Liens, § 146.

limit.³ Whether the statute requires dates to be given or not, the statement will be void if all its parts when taken into consideration do not show that the labor or materials were furnished within the time limit.⁴ This matter must be judged from the statement itself. It cannot be enlarged by extrinsic evidence.^{4a} Of course, as a matter of fact, it can be shown by evidence on the trial that the materials or services were actually furnished within the time limit, provided the statement was filed in time.⁵ Whether the account is a running one or not is a question of fact which may be determined by the conduct of the parties.⁶ Where the contract is entire, it is generally sufficient if the statement shows the dates between which the material or labor was furnished,⁷ even if composed of different items, provided all are within the time limit.⁸ If non-lienable items are intermingled, so that the non-lienable items can not be distinguished from the lienable items, all may

³*Kern v. Pfaff*, 44 Mo. App. 29; *Hayden v. Wulffing*, 19 Mo. App. 353; *Noll v. Kenneally*, 37 Neb. 879, 56 N. W. 722; *Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235.

⁴*Illinois*.—*Richardson v. Central Lumber Co.*, 105 Ill. App. 358.

New Jersey.—*Associates of Jersey Co. v. Davison*, 29 N. J. L. 415.

Pennsylvania.—*Rehrer v. Zeigler*, 3 Watts & S. (Pa.) 258; *Faulkner v. Reilly*, 1 Phila. (Pa.) 234.

Texas.—*Meyers v. Wood*, 26 Tex. Civ. App. 591, 65 S. W. 671.

West Virginia.—*O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

^{4a}*Armstrong v. Chisholm*, 100 App. Div. (N. Y.) 440, 91 N. Y. Supp. 693; *Endy v. Ogrydziak*, 10 Kulp (Pa.) 102.

⁵*Morgan v. Taylor*, 15 Daly (N. Y.) 304, 5 N. Y. Supp. 920; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257.

⁶*Grand Island Banking Co. v. Koehler*, 57 Neb. 649, 78 N. W. 265.

⁷*Delaware*.—*France v. Woolston*, 4 Houst. (Del.) 557.

Illinois.—*Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318; *Ehadin v. Murphy*, 170 Ill. 399, 48 N. E. 956; *National Home Bldg. & Loan Assn. v. McAllister*, 64 Ill. App. 143.

Nebraska.—*Garlichs v. Donnelly*, 42 Neb. 57, 60 N. W. 323.

⁸The intention is that it should show fully the account between the parties. *Mitchell Planing-Mill Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. 544.

be declared void.⁹ A substantial compliance with the terms of the statute as to the rendition of the services is generally regarded as sufficient.¹⁰ Thus statements have been held sufficient which set out that the materials were furnished between September, 1890, and Oct. 31, 1890,¹¹ that three carloads of stone were delivered between August 2nd and Sept. 27, 1889,¹² that the claim was for brick work between given dates,¹³ that "the above items were sold for \$677.65, and delivered between July 10, 1888, and Oct. 18, 1888,"¹⁴ or that "the contract was made April 16, 1841, and work done between 16th and 29th of August, 1842,"¹⁵ or within the past six months,¹⁶ that the work was hauling stone from "June 1, 1894, to May 16, 1895,"¹⁷ that the materials were "furnished between April 20 and July 19, and within four months from date of filing,"¹⁸ and generally that the articles or labor were furnished between certain dates.¹⁹

§ 114. **Claim or statement—sufficiency as to time.**—Generally the statement will be sufficient if there is enough of cer-

⁹Hughes v. Lansing, 34 Ore. 118, 55 Pac. 95, 75 Am. St. 574.

¹⁰St. Paul &c., Pressed Brick Co. v. Stout, 45 Minn. 327, 47 N. W. 974; Flack v. Jeffrey, 10 Manitoba 514.

¹¹Springer v. Kroeschell, 161 Ill. 358, 43 N. E. 1084.

¹²Johnson v. Stout, 42 Minn. 514, 44 N. W. 534.

¹³Ittner v. Hughes, 133 Mo. 679, 34 S. W. 1110.

¹⁴Noll v. Kenneally, 37 Neb. 879, 56 N. W. 722.

¹⁵Driesbach v. Keller, 2 Pa. St. 77.

¹⁶Bayer v. Reeside, 14 Pa. St. 167; Calhoun v. Mahon, 14 Pa. St. 56; Shaw v. Barnes, 5 Pa. St. 18, 47 Am. Dec. 399.

¹⁷Francis v. Wernwag, 12 Montg. Co. L. 104, 2 Lack. Leg. N. (Pa.) 164.

¹⁸Mitchell Planing-Mill Co. v. Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. 544.

¹⁹Moore v. Parish, 163 Ill. 93, 45 N. E. 573; Carlson v. Anderson, 66 Ill. App. 663. **Not sufficient.** Mechanic's Lien Act (Laws Ill. 1887, p. 219), § 4, requiring the account to state the times when the material was furnished, was not complied with by a statement that "work on the aforesaid buildings was commenced Jan. 20, 1893, and completed Aug. 18, 1893." Buckley v. Commercial Nat. Bank, 171 Ill. 284, 49 N. E. 617.

tainty to show during what period or time the materials were delivered or the work done,¹ bearing in mind that all must come within the time limit.² An error that is apparent on its face, and not misleading,³ or a variance in particular dates set forth in the claim,⁴ if the correct date can be ascertained from the statement,⁵ or even if a small part was delivered prior to the time alleged, the statement will not be defective.⁶ If the work is done on different⁷ or distinct contracts, the dates of the items furnished under each should be set forth in the statement.⁸ If there is but one date given, it will be presumed that the work or materials were furnished on that date.⁹ And if the only date mentioned is that given at the time of the statement that will be the presumed date.¹⁰ If the contract is entire, one date will be sufficient.¹¹ Certainty to a common intent is all that is required,¹² when all the parts of the statement are considered.¹³ Where the only question can be whether the lien is filed within a proper time, it will be suffi-

¹Small v. Foley, 8 Colo. App. 435, 47 Pac. 64; Brown v. Kolb, 8 Pa. Super. Ct. 413, 43 W. N. C. (Pa.) 26; Stuart v. Broome, 59 Tex. 466. Ordinary account, with debits and credits, and dates. Novelty Iron Works v. Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518. See § 94.

²Pardue v. Missouri Pac. R. Co., 52 Neb. 201, 71 N. W. 1022, 66 Am. St. 489.

³Hillary v. Pollock, 13 Pa. St. 186.

⁴Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. 616; Haviland v. Pratt, 1 Phila. (Pa.) 364. A variance of a few days, held fatal. Milligan v. Hill, 4 Phila. (Pa.) 52.

⁵McClintock v. Rush, 63 Pa. St. 203.

⁶Allen v. Elwert, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54.

⁷Buckely v. Commercial Nat. Bank, 171 Ill. 284, 49 N. E. 617.

⁸Clark v. Boarman, 89 Md. 428, 43 Atl. 926. See § 85.

⁹Donahoo v. Scott, 12 Pa. St. 45; Knabb's Appeal, 10 Pa. St. 186, 51 Am. Dec. 472.

¹⁰Fried v. Blanchard, 58 Ill. App. 622.

¹¹Edwards v. Derrickson, 4 Dutch. N. J. L. 39; Shaffer v. Hull, 2 Clark (Pa.) 321; Young v. Elliott, 2 Phila. (Pa.) 352.

¹²Williamson v. New Jersey Southern R. Co., 1 Stew. N. J. Eq. 277.

¹³Bangs v. Berg, 82 Iowa 350, 48 N. W. 90.

cient upon the determination of that question if only the date of the last item was given.¹⁴ A false and fraudulent statement will invalidate the lien.¹⁵ But the failure to make a proper statement, as the failure to give the date of the year, no one being misled, will not affect its validity.¹⁶ It has been held that the year is sufficiently stated if given at the head of the account,¹⁷ and if no date is given, the time intended will be considered as the date of the filing.¹⁸ It is generally not necessary to state the time of the completion of the work,¹⁹ nor that the debt is due or the claim has accrued,²⁰ nor when the

¹⁴*Lynch v. Feigle*, 11 Phila. (Pa.) 247, 33 Leg. Int. (Pa.) 408; *Kendall v. Fader*, 99 Ill. App. 104. A mechanic's lien claim alleged that the work was done and the materials furnished "within the 12 months last past, and the work, when completed, was delivered by" the contractor to the owner on September 21st last. Held that the claim showed that the work was completed, and delivered on September 21st. *Baker v. Winter*, 15 Md. 1.

¹⁵*May P. & Co., Brick Co. v. General Engineering Co.*, 180 Ill. 535, 54 N. E. 638.

¹⁶*Blanchard v. Fried*, 162 Ill. 462, 44 N. E. 880; *Bruce v. Hoose*, 48 Mo. App. 161; *Cole v. Barron*, 8 Mo. App. 509. Under positive statutory enactments as to statement of time, some courts have held, that not to make such statement is fatal. *Rehrer v. Zeigler*, 3 Watts & S. (Pa.) 258; *Reneker v. Hill*, 3 Phila. (Pa.) 110.

¹⁷*Bruce v. Hoose*, 48 Mo. App. 161.

¹⁸*McClintock v. Rush*, 63 Pa. St. 203.

¹⁹*California*.—*Slight v. Patton*, 96 Cal. 384, 31 Pac. 248.

Connecticut.—*Westland v. Goodman*, 47 Conn. 83; *Cole v. Uhl*, 46 Conn. 296.

Delaware.—*France v. Woolston*, 4 Houst. (Del.) 557.

Missouri.—*Mesker v. Cutler*, 51 Mo. App. 341.

Oregon.—*Curtis v. Sestanovich*, 26 Ore. 107, 37 Pac. 67.

Utah.—*Culmer v. Clift*, 14 Utah 286, 47 Pac. 85.

²⁰*Georgia*.—*Phillips v. Hyde*, 45 Ga. 220.

Illinois.—*Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115.

Missouri.—*Bruce v. Hoos*, 48 Mo. App. 161; *Sanderson v. Fleming*, 37 Mo. App. 595; *Mitchell Planing-Mill Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. 544.

Utah.—*Doan v. Clinton*, 2 Utah 417. A lien account which states that the "demand accrued within four months prior to the filing of this lien" is sufficient, although the items of the account are not dated. *People's Lumber Co. v. Hays*, 75 Mo. App. 516. Under

labor was performed, except as such facts may be essential to fix the time limit for filing, or the validity of the lien.²¹

§ 115. **Claim or statement—averment of amount due.**—The lien statement should always show the amount due or to become due between the parties to the account.¹ As to the degree of certainty required in this respect the statute must determine.² If the statute is silent and the account is made out in detail, the statement will be sufficient if it gives the general balance.³ However, if the statute requires a fuller statement

some statutes, where it seems that the statement is for the public generally, an allegation of the time when the debt is due, is required. *Wade v. Reitz*, 18 Ind. 307; *Hill v. Stagg*, 1 Wils. (Ind.) 403.

²¹*New York*.—*Lutz v. Ey*, 3 Abb. Pr. (N. Y.) 475, 3 E. D. Smith (N. Y.) 621.

Pennsylvania.—*Cowan v. Pennsylvania Plate-Glass Co.*, 184 Pa. St. 16, 38 Atl. 1081; *McKay's Appeal*, 37 Pa. St. 125; *Fourth Baptist Church v. Trout*, 28 Pa. St. 153; *Lehman v. Thomas*, 5 Watts & S. (Pa.) 262; *Ellice v. Paul*, 2 Phila. (Pa.) 102. On separate buildings, must show when each is completed. *Knauft v. Miller*, 45 Minn. 61, 47 N. W. 313. A claim for a mechanic's lien stating that certain work was done and materials furnished within six months last past does not sufficiently comply with Act April 24, 1849 (Pa.), which provides that, in the counties of Philadelphia and Chester, the claim shall state the time when the work was begun and ended. *McNamee v. Hildeburn*, 9 Pa. Co. Ct. 267.

¹*New Mexico*.—*Pearce v. Albright*, 12 N. Mex. 202, 76 Pac. 286.

New York.—*Maurer v. Bliss*, 14 Daly (N. Y.) 150; *Finn v. Smith*, 186 N. Y. 465, 74 N. E. 714.

North Dakota.—*Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340.

West Virginia.—*O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

Measurement. A mechanic's claim setting forth that it was for work and materials furnished in pursuance of a contract, is regular on its face, and the lien will be sustained by proof that the price of the work was to be ascertained by measurement after its completion. *Miller v. Bedford*, 86 Pa. St. 454. See Dec. & Am. Dig., tit. Mechanics' Liens, § 147.

²*Baumhoff v. St. Louis, &c., R. Co.*, 171 Mo. 120, 71 S. W. 156, 94 Am. St. 770.

³*Eggert v. Snoke*, 122 Iowa 582, 98 N. W. 372; *Bangs v. Berg*, 82 Iowa 350, 48 N. W. 90; *Nichols v. Culver*, 51 Conn. 177; *Fehling v. Goings*, 67 N. J. Eq. 375, 58 Atl. 642. A mechanic's lien statement, which states that the contract

showing the items, they must be set out to entitle the claimant to his lien.⁴ In a case where the contract was entire a general balance was held sufficient.⁵ A "just and true account" is made whenever it appears that the account filed has not been knowingly, intentionally or fraudulently falsified.⁶ An honest mistake as to the amount is not generally regarded as fatal⁷ unless it is misstated for a fraudulent purpose, in which event the entire statement is rendered void.⁸ So the statement will be void even where not false, if lienable and non-lienable items are so carelessly intermingled that it cannot be deter-

price was \$250, that the owner had paid \$125, "and that the sum of \$—— is still due," is a sufficient compliance with the statute requiring such statement to show the "balance due." *Harris v. Harris*, 9 Colo. App. 211, 47 Pa. 841.

⁴*Crandall v. Lyon*, 188 Ill. 86, 58 N. E. 972; *Ehdin v. Murphy*, 170 Ill. 399, 48 N. E. 956; *Lee v. Exeter Club*, 9 Pa. Super. Ct. 581; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729. See § 117. Under a statute requiring the notice of lien to contain "a statement of the demand and the amount thereof, after deducting, as near as possible, all just credits and offsets," it must state the amount due before and after deducting offsets. *Wheeler v. Port Blakely Mill Co.*, 2 Wash. Terr. 71, 3 Pac. 635.

⁵*Wescott v. Bunker*, 83 Me. 499, 22 Atl. 388. **Void.**—A claim for a lien for an aggregate amount of materials furnished under contracts between different parties, and mingled together in one

account, is void. *Hooven, &c., Co. v. Featherstone*, 111 Fed. 81, 49 C. C. A. 229.

⁶An account filed is not rendered incorrect by the omission of a credit for a sum which would have been due under a rebate. *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347. An exaggeration must be explained. *Grellick Co. v. Taylor*, 143 Mich. 704, 107 N. W. 712, 13 Det. Leg. N. 92.

⁷**Connecticut.**—*Kiel v. Carll*, 51 Conn. 440.

Illinois.—*Treloar v. Hamilton*, 225 Ill. 102, 80 N. E. 75.

New Jersey.—*Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40.

New York.—*Held v. Burke*, 83 App. Div. (N. Y.) 509, 82 N. Y. Supp. 426.

North Dakota.—*Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340.

Oregon.—*Chamberlain v. Hibbard*, 26 Ore. 428, 38 Pac. 437.

⁸*Bohn Mfg. Co. v. Keenan*, 15 S. Dak. 377, 89 N. W. 1009; *Hecla Iron Works v. Hall*, 115 App. Div. (N. Y.) 126, 100 N. Y. Supp. 696.

mined which are properly within the statute.⁹ The same result may follow if the statement is so defective that the amount claimed can not be ascertained.¹⁰ But a mere aggregated statement will not be held too indefinite where the credits may all apply on the total debt.¹¹ If the person charged has full knowledge of the amount claimed, then the demand for exactness is not so great, and a less degree of certainty will not invalidate the statement.¹² It has been held that the statement is sufficient if the amount can be determined by reference to the affidavit,¹³ or the bill attached.¹⁴ However, if claims have been assigned they cannot be blended together afterwards and a general balance for all given.¹⁵ Among other things it has been held that the statement was not invalidated by the

⁹*Peatman v. Centerville Light, Heat, &c., Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276; *Driscoll v. Hill*, 11 Allen (Mass.) 154. **Joint account.**—Where an individual account of one of the parties to a joint account and joint contract is incorporated in and confused with the account of materials furnished on the joint account, a mechanic's lien will not lie under Rev. St. (Mo.) 1889, § 6729. *McAdow v. Miltenberger*, 75 Mo. App. 346.

¹⁰*Reitz v. Ghio*, 47 Mo. App. 287; *White v. Livingston*, 69 App. Div. (N. Y.) 361, 75 N. Y. Supp. 466.

¹¹*Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318. A statement of mechanic's lien, including the claim of the lienor, and also the claims of others assigned to him, the amount due on each claim being stated separately, is not void because an aggregate credit is given; it being presumed, in the absence of evidence to the contrary, that the payment was made

after the assignment, and applied by the creditor to the total debt. *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

¹²*Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347; *Bryson v. St. Helen*, 79 Hun (N. Y.) 167, 29 N. Y. Supp. 524.

¹³*Drexel v. Richards*, 50 Neb. 509, 70 N. W. 23.

¹⁴*Lee v. Exeter Club*, 9 Kulp (Pa.) 209; *Muffy v. Karchnak*, 8 Kulp (Pa.) 278.

¹⁵*Hanna v. Colorado Sav. Bank*, 3 Colo. App. 28, 31 Pac. 1020. **Several pieces.**—Under 2 Bailingier's Wash. Ann. Codes & St. § 5907, providing that, where one claims a lien on separate pieces of property, if he does not designate the amount due on each piece, his lien is postponed to others, a lien is valid when the notice is defective in this respect, being merely postponed to other liens. *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001.

avement that the amount was payable in "gold coin,"¹⁶ or "with interest,"¹⁷ or "including cartage,"¹⁸ or that part is payable in stock,¹⁹ or land,²⁰ or by the omission of a sum due for a rebate.²¹ If the contract setting out the amount is in writing and the contract is given verbatim, or substantially, the statement will generally be sufficient as to the amount due.²² And even where the statute requires the statement to state the amount due after allowing all just credits and set-offs, the statement will not be void because of a failure to set out credits and deductions, but it will be presumed that there are none.²³ And where it is required that the amount be stated a statement in the form of ordinary bookkeeping, giving the credits and debits, will ordinarily suffice.²⁴ A substantial compliance with

¹⁶ *Nelhaus v. Morgan*, (Cal.) 45 Pac. 255.

¹⁷ *McMillan v. Seneca Lake Grape, Etc., Co.*, 5 Hun (N. Y.) 12.

¹⁸ *Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146.

¹⁹ *Baumhoff v. St. Louis, &c., R. Co.*, 171 Mo. 120, 71 S. W. 156, 94 Am. St. 770.

²⁰ **Irrigation Ditch.**—Where a contractor constructing an irrigation ditch agrees to select a tract of land out of those to be benefited, which is to be credited to him at a fixed price as part payment for the work, provided his employer secures a sufficient deed from the owner to himself, a subsequent mechanic's lien filed by such contractor is not invalid for failure to credit the price of such land on the amount of his claim, where it does not appear that there was ever any tender of the deed, or any showing of readiness or willingness to deliver it.

Springer Land Assn. v. Ford, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. ed. 562.

²¹ *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347.

²² *Robertson v. Moore*, 2 Idaho 115, 77 Pac. 218; *Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413; *Red River Lumber Co. v. Children of Israel*, 7 N. Dak. 46, 73 N. W. 203. Under the Ohio statute, if the contract is in writing this should be stated and where possible a copy should be given, as this will give the terms of payment. No other statement need be given. *Kunkle v. Reeser*, 5 Ohio N. P. 401.

²³ *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422; *Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235.

²⁴ *Ehlin v. Murphy*, 170 Ill. 399; 48 N. E. 956; *Hobbs v. Spiegelberg*, 3 N. Mex. 357, 5 Pac. 529; *Ainslie v. Kohn*, 16 Ore. 363, 19 Pac. 97. **On different buildings.**—*Southern California Lumber Co. v. Peters*, 3 Cal. App. 478, 86 Pac. 816.

the statute is all that is demanded.²⁵ Under some statutes a claimant is authorized to file a promissory note given by the owner in lieu of a statement. In the absence of a statute this would seem to satisfy the requirement as to notice of the amount due. The provision is regarded as permissive rather than compulsory and does not prevent the claimant from filing an itemized statement.²⁶

§ 116. **Claim or statement—itemized account.**—While the statement must show that there is a certain amount due,¹ yet unless the statute so directs, the statement need not contain an itemized account.² Statutory requirements that there be a

²⁵ **Alabama.**—Alabama State Fair & Agr. Assn. v. Alabama Gas Fixture & Plumbing Co., 131 Ala. 256, 31 So. 26.

California.—Preston v. Sonora Lodge, 39 Cal. 116.

Missouri.—McLaughlin v. Schwacker, 31 Mo. App. 365.

New York.—Smith v. Baily, 8 Daly (N. Y.) 128.

Oregon.—Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407; Whittier v. Blakely, 13 Ore. 546, 11 Pac. 305.

Texas.—Bassett v. Brewer, 74 Tex. 554, 12 S. W. 229; Noyes v. Smith, (Tex. Civ. App.) 77 S. W. 649.

West Virginia.—O'Niel v. Taylor, 59 W. Va. 370, 53 S. E. 471. Comp. Laws, N. Mex. 1884, § 1524, requiring a claim of lien to state the lienor's demands after "deducting all just credits and offsets" is satisfied by a statement that the lien is a certain sum, the balance due, after deducting all just credits and offsets, for work done under a contract which is made part of the notice, and for an additional sum for extra

work allowed by the terms of the contract. Ford v. Springer Land Assn., 8 N. Mex. 37, 41 Pac. 541. Where the statement substitutes words "over and above all credits and effects" for the words "over and above all credits and offsets" mentioned in the statute, it is a substantial compliance therewith. Merchant v. Humes-ton, 2 Wash. Terr. 433, 7 Pac. 903. A slight unintentional mistake will not defeat the lien. Alabama, &c., Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

²⁶ Higley v. Ringle, 57 Kan. 222, 45 Pac. 619; Knutzen v. Hanson, 28 Neb. 591, 44 N. W. 1065.

¹ See §§ 81, 115.

² **Alabama.**—Garrison v. Hawkins Lumber Co., 111 Ala. 308, 20 So. 427.

Missouri.—Mahan v. Brinnell, 94 Mo. App. 165, 67 S. W. 930.

Ohio.—Keating v. Worthington, 11 Ohio Dec. Re. 428, 27 Wkly. L. Bul. (Ohio) 14; Thomas v. Huesman, 10 Ohio St. 152.

Oregon.—Curtis v. Sestanovich,

statement "of the demand, showing its nature and character,"³ or "of the terms, time and conditions of contract,"⁴ or "of the amount due,"⁵ or a "just and true account with all credits,"⁶ or "demand after deducting all credits,"⁷ or "true statement of demands,"⁸ or "specifically set forth precisely the amount claimed,"⁹ or "stating the specific amount claimed,"¹⁰ have been held not to require an itemized statement. On the other hand, it has been held that a simple statement that a certain sum is due, was not a "statement or account of the demand,"¹¹ and that a bare statement of a round sum due was not a "just and true account of the demand due after all credits have been given."¹² As a general rule "a just and true account" implies an itemized or detailed statement of the transactions which are the basis of the lien.¹³ Subcontractors

26 Ore. 107, 37 Pac. 67; Ainslie v. Kohn, 16 Ore. 363, 19 Pac. 97.

Utah.—Culmer v. Caine, 22 Utah 216, 61 Pac. 1008. Mechanic's Lien Act, Ill. 1895, § 7, requiring an itemized account of extras, when such are claimed, goes only to a recovery for the extras, and cannot defeat the entire claim; and hence, a claim of lien is not defective, because the extras averred in the petition are not itemized in the claim. Sedgwick v. Concord Apartment House Co., 104 Ill. App. 5. Substantial compliance only required. Dobson v. Thurman, (Ky.) 101 S. W. 310, 30 Ky. L. 1331. See Dec. & Am. Dig. tit. Mechanic's Lien, § 149.

³ Selden v. Meeks, 17 Cal. 128; Brennan v. Swasey, 16 Cal. 140, 76 Am. Dec. 507. If annexed sufficient. American Car & Foundry Co. v. Alexandria Water Co., 215 Pa. 520, 64 Atl. 683.

⁴ Jewell v. McKay, 82 Cal. 144, 23 Pac. 139.

⁵ Ricker v. Joy, 72 Me. 106.

⁶ Sexton v. Weaver, 141 Mass. 273, 6 N. E. 367.

⁷ Lonkey v. Wells, 16 Nev. 271. An itemized statement containing the single item "estimate furnished, \$485," has been held not sufficient to entitle the material man to his lien for such item of \$485. Niswander v. Black, 50 W. Va. 188, 40 S. E. 431.

⁸ Ainslie v. Kohn, 16 Ore. 363, 19 Pac. 97.

⁹ Emack v. Campbell, 14 App. Cas. (D. C.) 186.

¹⁰ Neeley v. Searight, 113 Ind. 316, 15 N. E. 598.

¹¹ McDonald v. Rosengarten, 35 Ill. App. 71; Valentine v. Rawson, 57 Iowa 179, 10 N. W. 338; Graves v. Pierce, 53 Mo. 423.

¹² McWilliams v. Allan, 45 Mo. 573.

¹³ **Missouri.**—Mitchell Planing-Mill Co. v. Allison, 71 Mo. App.

are generally required to file itemized statements.¹⁴ An account having no heading to it,¹⁵ or so uncertain that it cannot be determined who is to be charged, or what for, is clearly insufficient.¹⁶ Even where the statute requires an itemized statement, the items need not be set out in detail if the contract is for a gross sum,¹⁷ or is what is known as a "lump job,"¹⁸

251; *Curless v. Lewis*, 46 Mo. App. 278; *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118.

New Jersey.—*Associates of Jersey Co. v. Davison*, 5 Dutch. N. J. L. 415.

North Carolina.—*Wray v. Harris*, 77 N. Car. 77.

Pennsylvania.—*Wolf v. Keeley*, 23 Pa. Co. Ct. 408; *Chapman v. Faith*, 18 Pa. Super. Ct. 578; *Joyce v. Corcoran*, 9 Kulp, (Pa.) 502.

West Virginia.—*Niswander v. Black*, 50 W. Va. 188, 40 S. E. 435. An account is defined to be a detailed statement of mutual demands in the matter of debt and credit between the parties, arising out of contract, or some fiduciary relation. The definition is an accurate one, and expresses the sense in which the term is used in the mechanic's lien law, and also the sense in which the word is current in business affairs. *McWilliams v. Allan*, 45 Mo. 573.

¹⁴ **Missouri.**—*Mahan v. Brinnell*, 94 Mo. App. 165, 67 S. W. 930.

Pennsylvania.—*Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168, 36 Atl. 725, 57 Am. St. 629, 40 W. N. C. (Pa.) 33; *Gray v. Dick*, 97 Pa. St. 142; *Chapman v. Faith*, 18 Pa. Super. Ct. 578; *Davenport v. Persch*, 17 Pa. Co. Ct. 423, 5

Pa. Dist. 38; *Howell v. Campbell*, 12 Phila. (Pa.) 388. Whether he is a subcontractor or contractor, is for the jury to determine. *McCune v. Hatch*, 18 Pa. Super. Ct. 469.

¹⁵ *Maroni v. Junty*, 26 R. I. 109, 58 Atl. 450.

¹⁶ *Bossert v. Happel*, 89 App. Div. (N. Y.) 7, 85 N. Y. Supp. 308; *Malaney v. Mears*, 2 Lack. Leg. N. (Pa.) 77.

¹⁷ **California.**—*Heston v. Martin*, 11 Cal. 41.

Delaware.—*France v. Woolston*, 4 Houst. (Del.) 557.

Kansas.—*Nixon v. Cydon Lodge*, 56 Kan. 298, 43 Pac. 236.

Maine.—*Wescott v. Bunker*, 33 Me. 499, 22 Atl. 388.

Minnesota.—*Leeds v. Little*, 42 Minn. 414, 44 N. W. 309.

Ohio.—*Davis v. Hines*, 6 Ohio St. 473.

Pennsylvania.—*Young v. Lyman*, 9 Pa. St. 449; *Stiles v. Leamy*, 1 Phila. (Pa.) 29, 7 Leg. Int. (Pa.) 19; *Haines v. Burr*, 1 Phila. (Pa.) 52.

¹⁸ **Illinois.**—*Moore v. Parish*, 58 Ill. App. 617.

Kansas.—*School Dist. No. 3 v. Howell*, 44 Kan. 285, 24 Pac. 365; *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230.

Missouri.—*Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118; *Buchanan*

especially as between the owner and the contractor.¹⁹ But the statement should be itemized where the matter is between the owner and the subcontractor,²⁰ or where a third person may be interested in knowing what each item cost or is worth.²¹ Under some statutes it is held that while the price may be stated as an entirety, yet the items must be set forth in detail.²²

v. Cole, 57 Mo. App. 11; *Smith v. Haley*, 41 Mo. App. 611; *Louisiana, &c., Lumber Co. v. Myers*, 87 Mo. App. 671.

Nebraska.—*Doolittle v. Plenz*, 16 Neb. 153, 20 N. W. 116; *Gulou v. Ryckman*, 77 Neb. 833, 110 N. W. 759.

Ohio.—*Thomas v. Huesman*, 10 Ohio St. 152.

Pennsylvania.—*Knabb's Appeal*, 10 Pa. St. 186, 51 Am. Dec. 472; *Thorn v. Heugh*, 9 Leg. Int. (Pa.) 46; *Brown v. Kolb*, 43 W. N. C. (Pa.) 26, 8 Pa. Super. Ct. 413; *McDowell v. Hill*, 1 Phila. (Pa.) 102; *Haines v. Barr*, 1 Phila. 52, 7 Leg. Int. (Pa.) 54.

Texas.—*Pool v. Wedemeyer*, 56 Tex. 287.

Virginia.—*Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

Vermont.—*Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235. The earlier Missouri cases hold, that even if it be a lump charge or an entire contract, that it must be set out in detail; afterwards this doctrine was modified, so that only a detailed statement was acquired when a recovery was sought upon a quantum meruit. A later court announced the doctrine now generally followed that where the contract is entire or a

lump charge made, that a detailed statement is not required. *Busso v. Fette*, 55 Mo. App. 453.

¹⁹ **Missouri.**—*Hilliker v. Francisco*, 65 Mo. 598; *Abbott v. Howd*, 60 Mo. App. 196, 1 Mo. App. Rep'r, 115; *Busso v. Fette*, 55 Mo. App. 453; *Neal v. Smith*, 49 Mo. App. 328.

Pennsylvania.—*Young v. Lyman*, 9 Pa. St. 449; *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

²⁰ *Shields v. Garrett*, 12 Phila. (Pa.) 458. **Not Required from Subcontractor.**—Where the work undertaken by a subcontractor is an entire job—as the construction of a heating and ventilating plant—for an entire price, and the contract is set out in the affidavit claiming a lien for the contract price, an itemized statement of account is not required under such statute. *Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165.

²¹ *Carson v. White*, 6 Gill (Md.) 17.

²² *Sosman v. Conlon*, 57 Mo. App. 25; *Bruns v. Capstick*, 46 Mo. App. 397; *Kern v. Pfaff*, 44 Mo. App. 29. Under Rev. St. Mo. § 3176, requiring a contractor, in order to be entitled to a mechanic's lien, to file a statement show-

§ 117. **Claim or statement—sufficiency of detail.**—The statutory requirements in reference to what the statement should contain, its items, etc., must be substantially complied with.¹ And it has been held that in determining the sufficiency of such statement, the same rules are applied as in pleading in deciding a demurrer to a petition.² But the courts cannot supply the omission of material parts.³ However, immaterial omissions or mistakes will be disregarded.⁴ So if matters are inserted that ought not to be, unless fraudulently done, it will

ing a true account of the demand due him after all credits have been given, the statement must be fairly itemized, showing the materials used, the work done, and the price charged; and a statement filed by a principal contractor lumping the contract price on the one side and the credits on the other, and referring to certain plans and specifications for the work done and materials furnished, is not sufficient. *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225.

¹ *Sosman v. Great Southern Fireproof Hotel Co.*, 116 Fed. 800, 54 C. C. A. 162; *Felgenhauer v. Haas*, 123 App. Div. (N. Y.) 75, 108 N. Y. Supp. 476; *Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165. St. Vt. c. 109, requiring a mechanic's lien claimant to file a written memorandum signed by him asserting his claim, does not require that the statement should contain the particulars of the contract or the items of the account. *Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235.

² *Ferguson v. Ashbell*, 53 Tex. 245.

³ *Ellinwood v. Worcester*, 154 Mass. 590, 28 N. E. 1053.

⁴ *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43; *Deardorff v. Roy*, 50 Mo. App. 70. First and last item incorrectly given, no one being misled. *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695. Letters and abbreviations. *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550. Omission of dollar mark. *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550. *Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. 344. Price not carried out for each item. *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118. Where material for a building is purchased on one day, and the items delivered at various subsequent dates, and the lien account sets them all forth as of the date of the purchase, such irregularity will not vitiate the account. *Louisiana & Co., Lumber Co. v. Myers*, 87 Mo. App. 671. Ordinary bookkeeping abbreviations. *Schulenberg v. Werner*, 6 Mo. App. 292; *Gray v. Dick*, 97 Pa. St. 142. Trade terms. *Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165.

be immaterial.⁵ The omission of the date is held to be fatal,⁶ but one date at the top may be sufficient as to all items that were delivered at that time.⁷ An itemized exhibit attached will supply an omission of that character in the statement.⁸ As a general rule it may be said that in determining questions of this character, all the papers filed are to be considered together.⁹ A statement that sets forth the dates of payment on the contract and amounts unpaid and claimed as due is a "true and correct account,"¹⁰ or gives "times, prices and credits" fully,¹¹ or in the usual mode of estimating work, shows quantity and measurement of different elements, it is sufficient.¹² But a statement containing but three items, namely, the contract price, the total value of material and labor on an abandoned job,

⁵ *Ulrich v. Osborn*, 106 Mo. App. 192, 81 S. W. 228; *Schulenberg & Co., Lumber Co. v. Strimple*, 33 Mo. App. 154.

⁶ *Meyers v. Wood*, 25 Tex. Civ. App. 591, 65 S. W. 671.

⁷ *Meyers v. Wood*, 95 Tex. 67, 65 S. W. 174.

⁸ *Maryland*.—*Baker v. Winter*, 15 Md. 1.

Oklahoma.—*Ferguson v. Stephenson-Brown Lumber Co.*, 14 Okla. 148, 77 Pac. 184.

Pennsylvania.—*Knabb's Appeal*, 10 Pa. St. 186, 51 Am. Dec. 472; *Haines v. Barr*, 1 Phila. (Pa.) 52, 7 Leg. Int. (Pa.) 54.

Washington.—*Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316.

United States.—*Sosman v. Great Southern Fireproof Hotel Co.*, 116 Fed. 800, 54 C. C. A. 162.

⁹ *Peoples' Lumber Co. v. Hayes*, 75 Mo. App. 516.

¹⁰ An account, consisting of a charge, "To lumber for house" and of a credit, "By work," is sufficiently itemized account un-

der law, which provides that the account be in writing of the items of "labor, skill, machinery, or material furnished." *Manly v. Downing*, 15 Neb. 637, 19 N. W. 601.

¹¹ *Miller v. Whitelaw*, 28 Mo. App. 639; *Burrough v. White*, 18 Mo. App. 229.

¹² *Missouri*.—*Walden v. Robertson*, 120 Mo. 38, 25 S. W. 349; *Kearney v. Wurdeman*, 33 Mo. App. 447; *McLaughlin v. Schawacker*, 31 Mo. App. 365; *McDermott v. Class*, 104 Mo. 14, 15 S. W. 995.

Montana.—*Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285.

Pennsylvania.—*Smaltz v. Knott*, 3 Grant Cas. (Pa.) 227. The lien account of a subcontractor, who was wrongfully prevented by the owner from completing his work on the building merely contained a charge "for 2,493 hours' carpenter work" on the building at a stated price per hour, and a credit for a payment received thereon. Held, that the account was

is not a sufficient itemized statement.¹³ Neither is a "bill of doors" and a "bill of mill work,"¹⁴ nor merely stating the time between certain dates,¹⁵ nor the balance due,¹⁶ nor a reference to the contract for items.¹⁷ If under the law one claim can be filed against several buildings,¹⁸ the items need not be apportioned.¹⁹ Where statutes require the apportionment of the items furnished, it is held that it does not apply where the structures are all on one piece of land.²⁰ If the material is used on different houses on separate tracts of land, it is gen-

sufficient. *Brockmeyer v. Dette*, 58 Mo. App. 607. A mechanic's claim filed in court charged a building as follows: "To 1,100 yards of plastering on house of Mrs. Smith commenced on or about January 5, 1885, and finished on April 7, 1885, \$300. Of this sum the one-half, viz., \$150 is for work and labor done in plastering said house, and the other half, viz., \$150, is for materials, viz., lime, sand, hair, water, etc., furnished for said plastering," is sufficient when the same were done. *Smith v. Sarver*, (Pa.) 7 Atl. 99.

¹³ *Nixon v. Cydon Lodge*, 56 Kan. 298, 43 Pac. 236.

¹⁴ *Meyers v. Wood*, 95 Tex. 67, 65 S. W. 174.

¹⁵ *Holtschneider v. Page*, 51 Mo. App. 285; *Mercer Milling, &c., Co. v. Kreaps*, 18 Pa. Super. Ct. 1. Under a statute providing for a just and true account a statement of "goods furnished from September 1st, 1890, to July 2, 1892," "17 other items, amounting to \$4,394," is insufficient. *Cahill v. Orphan School of Christian Church*, 1 Mo. App. 488, 63 Mo. App. 28.

¹⁶ Where the statute requires the filing of an account in the clerk's office, an account as follows, viz.: "To balance of account rendered for work and labor done and materials furnished for your house,"—is not sufficient. *Shackleford v. Beck*, 80 Va. 573. Amount of estimate does not show amount and character of work. *Brown v. Cornwell*, (Va.) 60 S. E. 623.

¹⁷ *Louis v. Cutter*, 6 Mo. App. 54.

¹⁸ See § 85.

¹⁹ *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833.

²⁰ *California*—*Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Dickenson v. Bolyer*, 55 Cal. 285; *Bank of Charleston v. Curtiss*, 18 Conn. 342; *Bowman Lumber Co. v. Newton*, 72 Iowa, 90, 33 N. W. 377. Mansion house, barn, wagon, house, on one farm. *Lauman's Appeal*, 8 Pa. St. 473. A bone-boiling establishment, bone house, wagon shed, dwelling house, and stable, on one tract of land, is good. *Griel's Appeal*, (Pa.) 9 Atl. 861.

erally required that the statement should show what is properly charged against each house.²¹ In some cases it is held that the failure to apportion will not destroy the lien, but merely work a postponement of the claim.²² Under statutes that give a lien for *constructing*, separate from *repairing*, the lien statement should show what is furnished for each.²³ And where it is proper to apportion the items, separate statements may be filed for each.²⁴ If the parties agree on a lump charge on several buildings it may be so filed,²⁵ but if the building has separate owners, the statement should show what was furnished to each, properly itemized.²⁶

§ 118. **Claim or statement—signature of claimant.**—The claim must in some manner be signed by the claimant, that is, it should appear from the statement itself that a certain person is claiming the benefit of the lien law.¹ This signature or signing may be done personally,² or by attorney,³ or agent.⁴ If done by the agent it would be good, even if the authority of

²¹ *Goodman v. Fried*, 55 Ill. App. 362; *Morris County Bank v. Rock-away Mfg. Co.*, 1 C. E. Green (N. J. Eq.) 150; *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875. Even if on an appurtenance. *Carpenter v. Leonard*, 5 Minn. 119. Double house. *Malone's Appeal*, 79 Pa. St. 481. Three blocks. *Bradley Co. v. Anderson*, 20 Pa. Co. Ct. 236.

²² *Thomas v. James*, 7 Watts & S. (Pa.) 381; *Beitzel v. Stair*, 2 Pa. Dist. (Pa.) 337; *Gross v. Stoltz*, 2 Pa. Co. Ct. (Pa.) 190.

²³ *James v. Van Horn*, 10 Vroom (N. J. L.) 353; *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 Pac. 713.

²⁴ *Gordon v. Norton*, 186 Pa. St. 168, 40 Atl. 312, 42 W. N. C. 201.

²⁵ *Dallas v. Brown*, 60 Mo. App. 493, 1 Mo. App. Rep'r, 197.

²⁶ One partly owning lower and other upper stories. *Badger Lumber Co. v. Stepp*, 157 Mo. 366, 57 S. W. 1059.

¹ *Hentig v. Sperry*, 38 Kan. 459, 17 Pac. 42. See Dec. & Am. Dig. tit. Mechanic's Liens, § 153.

² *Stout v. Golden*, 9 W. Va. 231.

³ *Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899; *Jeffersonville Water-Supply Co. v. Ritter*, 146 Ind. 521, 45 N. E. 697; *Siegmund v. Kellogg-Mackay-Cameron Co.*, 38 Ind. App. 95, 77 N. E. 1096. Manager of firm. *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230.

⁴ *Donahoo v. Scott*, 12 Pa. St. 45.

the agent was afterwards given by ratification.⁵ It has been held that signing the verification is signing the claim,⁶ but in West Virginia under the statute it was held that, "subscribing the affidavit" was not "subscribing the account."⁷ This seems to be rather a technical holding. A co-partnership may sign by the co-partnership name and not the individual name of the partners.⁸ Signing the firm name to the claim and the individual name to the affidavit will not be a variance and will be held to be sufficient.⁹ One partner has an implied agency to sign for the firm.¹⁰ But where one partner administers the oath to the other, the improper signature will invalidate the statement.¹¹ One court has held that giving the name at the top of the bill is not its signature.¹² But if it appears otherwise in the body of the bill that a certain person is the claimant, other courts have held that that fact would be sufficient, and the failure to sign would not invalidate the lien.¹³ A statutory requirement that the claim be in writing does not require it to be signed.¹⁴ Immaterial omissions in this respect

⁵ *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

⁶ *Hicks v. Murray*, 43 Cal. 515; *Deatherage v. Woods*, 37 Kan. 59, 14 Pac. 474.

⁷ *Mayes v. Ruffners*, 8 W. Va. 384.

⁸ *Smith v. Johnson*, 2 MacArthur, (D. C.) 481.

⁹ *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230. The claimant was designated in the statement as the "Chicago Lumber Company," and the verification of the same signed, "Jos. M. Eck, Manager, Claimant." The bill of items which formed a part of the statement made by the claimant designated Eck as manager. Held, that the signing and verification of the statement was

not so defective as to defeat the lien. *Pierce v. Osborn*, 40 Kan. 168, 19 Pac. 656.

¹⁰ *White v. Dumpke*, 45 Wis. 454.

¹¹ *Smalley v. Bodinus*, 120 Mich. 363, 79 N. W. 567.

¹² *Stratton v. Shoenbar*, (Me.) 10 Atl. 446.

¹³ *Sturdevant v. Nugent*, 9 Kulp (Pa.) 176.

¹⁴ *Moore v. McLaughlin*, 66 Hun (N. Y.) 133, 21 N. Y. Supp. 55. And neither the notice of lien nor the affidavit of verification thereon need be signed by the claimant in order to constitute a valid notice, service, by a material man, on the owner of the property, of a notice of lien, which is a copy of a notice filed, except

are disregarded, such as "of St. Louis" after a corporate name.¹⁵

§ 119. **Claim or statement—verification.**—Whether or not the claim must be verified depends upon the statute, and if the statute so requires, the claim will be invalid if it is not properly verified.¹ It is held to be a condition precedent and if not

that neither the copy nor the verification is signed, though the notice filed is signed by the claimant, is sufficient to charge the owner. *Reeves v. Seitz*, 47 App. Div. (N. Y.) 267, 62 N. Y. Supp. 101.

¹⁵ *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 520.

¹ *Alabama*.—*McConnell v. Meridian Sash, &c.* Fact. 112 Ala. 582, 20 So. 929.

Colorado.—*Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

Michigan.—*Lindsay v. Huth*, 74 Mich. 712, 42 N. W. 358.

Nebraska.—*Terry v. Prevo*, (Neb.) 95 N. W. 338.

New York.—*Conklin v. Wood*, 3 E. D. Smith (N. Y.) 662.

North Dakota.—*Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340.

Canada.—The affidavit constitutes the lien, and in order to acquire the right must be strictly followed. *Haggerty v. Grant*, 2 Brit. Col. 173.

Necessity.—"Where a statute declares that the notice to create a lien shall be verified before filing, it is essential to the creation of the lien that it should be sworn

to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim and cannot be amended." *Phillips, Mechanics' Liens* (2d ed.) § 336, p. 597; *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338; *Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. M. 256, 5 Pac. 725; *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481; *Gates v. Brown*, 1 Wash. 470, 25 Pac. 914; *Stetson, &c., Mill Co. v. McDonald*, (Wash.) 32 Pac. 108; *Byrd v. Cochran*, 39 Neb. 119.

Definition.—"The statement of account which the lien claimant files must be 'verified by affidavit.' In the absence of a statute affixing a different meaning, 'an affidavit is simply a written declaration on oath, in writing, sworn to by the declarant, before a person who has authority to administer oaths.' *And. Law. Dict.*, 1 *Bouv. Law Dict.* 79; *Harris v. Lester*, 80 Ill. 307; *Hitsman v. Garrard*, 16 N. J. L., 124; *Cox v. Stern*, 170 Ill. 442, 48 N. E. 906; 1 *Enc. Pl. & Prac.* 309. See also, *Comp. Laws* § 5278. 'The jurat or certificate is no part of the oath or affidavit, but simply evidence

performed as the statute directs, the claim is of no avail.² Where a list is filed with the statement it must by reference or otherwise be shown to be part of the statement which is intended to be sworn to, or it will be void,³ as all parts of the statement must be verified.⁴ However, the verification or affidavit is not evidence of the correctness of the account; this must be shown by other proper evidence.⁵ If the statute does not require a verification, the statement will be good without it.⁶ And under other statutes it has been held that a failure to verify the lien will not invalidate the claim, but will postpone the lien to interest of parties acquired in good faith.⁷ The affidavit is evidence of its own existence and if properly made out and sworn to, whether the person knew it to be *true* or *not* will not affect its validity.⁸ Unless the statute in addition requires that the person signing the same had personal knowledge of the facts, no allegation of this fact is necessary,⁹ nor

that the oath was made or the affidavit was sworn to.' *Bantley v. Finney*, 43 Neb. 794, 62 N. W. 213; *Williams v. Stevenson*, 103 Ind. 243, 2 N. E. 728. It is also held that 'it is not necessary to its completeness that the party making should sign it, unless the statute expressly requires such signatures.' *Bates v. Robinson*, 8 Iowa 318; *Hagardine v. Van Horn*, 72 Mo. 379; *Norton v. Hauge*, 47 Minn. 405, 50 N. W. 368." See Dec. & Am. Dig. tit. Mechanics' Liens, § 154.

² **Colorado.**—*Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010.

New York.—*Cream City Furniture Co. v. Squier*, 2 Misc. (N. Y.) 438, 21 N. Y. Supp. 972.

Pennsylvania.—*Gibbs v. Peck*, 77 Pa. St. 86; *Snyder v. Crothers*, 31 Leg. Int. 404, 1 Walk. (Pa.)

39; *Egolf v. Casselberry*, 14 Pa. Co. Ct. 87.

³ *Martin v. Burns*, 54 Kan. 641, 39 Pac. 177.

⁴ *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481.

⁵ Statute did not require account to be sworn to and it was not sworn to. *Darlington v. Eldridge*, 88 Mo. App. 525.

⁶ *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. 551.

⁷ *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819.

⁸ *Leftwich Lumber Co. v. Florence Mutual Building, &c., Assn.*, 104 Ala. 584, 18 So. 48; *Union Stove Works v. Klingman*, 164 N. Y. 589, 58 N. E. 1093; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. St. 674.

⁹ *Arata v. Tellurium Gold, &c., Min. Co.*, 65 Cal. 340, 4 Pac. 195.

need the verification re-state the facts upon which the claim is based.¹⁰ A member of a firm,¹¹ or officer of a corporation may make a verification,¹² but in such cases it should show that it is sworn to in his individual capacity.¹³ It is immaterial whether the affidavit shows the agency or not,¹⁴ but it should show on its face that it was sworn to.¹⁵ A substantial compliance with the statute in this regard is all that is required.¹⁶

¹⁰ *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422.

Frivolous.—An objection to a mechanic's lien claim that the verification states that the facts stated therein are true, instead of that the claim is true, is frivolous. *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

¹¹ *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 Pac. 431; *McGeever v. Harris*, (Ala.), 41 So. 930.

¹² *Cooper Mfg. Co. v. Delahunt*, 36 Ore. 402, 60 Pac. 1.

¹³ *McGillivray v. Case*, 107 Iowa 17, 77 N. W. 483; *Montana Lumber, &c., Co. v. Obelisk Mining, &c., Co.*, 15 Mont. 20, 37 Pac. 897.

Sufficient.—The oath attached to an "account of the items" for material furnished, and for which a lien was claimed, recited that "J. A. B., being first duly sworn," and was signed "Capital City Planing Mills. Per. J. A. B., Sec'y." The account of the items was headed, "M. to Capital City Planing Mills, Dr." Held, it sufficiently appeared that the lien was claimed by the Capital City Planing Mills, and not by J. A. B., and there was a substantial compliance with Comp. St. c. 54, § 3, providing for an account veri-

fied under oath. *Henry, &c., Co. v. Fisherick*, 37 Neb. 207, 55 N. W. 643.

Defective.—There is annexed to this lien what purports to be a verification, which is as follows: "....., being duly sworn, says that he is M. Kane & Son, the lienors mentioned in the foregoing notice of lien; that he has read the said notice, and knows the contents thereof; and that the statements contained are true to their knowledge except as to the matter therein stated to be alleged on information and belief, and that as to those matters they believe it to be true. M. Kane & Son." *Kane v. Hutkoff*, 81 App. Div. (N. Y.) 105, 81 N. Y. Supp. 85.

¹⁴ *McLaughlin v. Schultz*, 125 Mo. 469, 28 S. W. 755; *Missouri Valley Lumber Co. v. Weber*, 43 Mo. App. 179; *Riter v. Houston Oil Refining, &c., Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758. One may make it for two joint claimants. *Waters v. Goddberg*, 124 App. Div. (N. Y.) 511, 108 N. Y. Supp. 992.

¹⁵ *Finane v. Las Vegas Hotel & Improvement Co.*, 3 N. M. 256, 5 Pac. 725.

¹⁶ *Alabama*. — *Alabama State Fair, &c., Assn. v. Alabama Gas*

But if there is not such a compliance the statement is void.¹⁷

§ 120. **Claim or statement—verification, continued.**—If the statute requires the statement to show that affiant has knowledge of the facts sworn to, it is fatal if it does not state such fact,¹ and it is not cured by the fact that the affiant really had such knowledge.² Some courts have held that if an agent makes the oath it is not sufficient if he makes it upon information and belief.³ As a general rule, however, an affidavit made

Fixture, &c., Co., 131 Ala. 256, 31 So. 26.

Colorado.—*Gutshall v. Kornaley*, 38 Colo. 195, 88 Pac. 158.

Minnesota.—*Nordine v. Knutson*, 62 Minn. 264, 64 N. W. 565.

Missouri.—*Williams v. Stroub*, 168 Mo. 346, 57 S. W. 875.

Washington. — *Sautter v. Mc. Donald*, 12 Wash. 27, 40 Pac. 418; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729; *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316. Claimant's verification to the notice of lien was that he knew the contents thereof, and that the same were true, but he did not swear that the "statements" were true. Held, that the verification, though not in statutory language, was a substantial compliance with the law. *Schwartz v. Allen*, 7 N. Y. Supp. 5.

¹⁷ **Illinois.**—*Orr, &c., Hardware Co. v. Russell*, 169 Ill. 100, 48 N. E. 444; *A. R. Beck Lumber Co. v. Halsey*, 41 Ill. App. 349.

New York.—*Kane v. Hutkoff*, 81 App. Div. (N. Y.) 105, 81 N. Y. Supp. 85.

Oklahoma.—*El Reno Electric Light, &c., Co. v. Jennison*, 5 Okla. 759, 50 Pac. 144.

South Carolina. — *Murphy v. Valk*, 30 S. Car. 262, 9 S. E. 101. Under Rev. St. Ill. 1889, c. 82, §§ 4, 28, which provide that every lien claimant, in order to obtain a lien, must file a statement "setting forth the times when such material was furnished, or labor performed, verified by affidavit," an affidavit stating that "the claimant has performed the labor and furnished the materials, set forth in the above statement" is not a sufficient verification to sustain a lien, since it does not verify the dates given in the statement. *McDonald v. Rosengarten*, 134 Ill. 126, 35 Ill. App. 71, 25 N. E. 429.

¹ *Florence Bldg. & Inv. Assn. v. Schall*, 107 Ala. 531, 18 So. 108; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918; *Globe Iron Roofing, &c., Co. v. Thatcher*, 87 Ala. 458, 6 So. 366.

² *Long v. Pocahontas Coal Co.*, 117 Ala. 587, 23 So. 526.

³ *Dorman v. Crozier*, 14 Kan. 224. An affidavit by a contractor to a statement for mechanic's lien, which Rev. St. Ill. 1889, c. 82, § 4, required to be "verified by an affidavit," is sufficient where affiant says the foregoing state-

on information and belief is sufficient.⁴ Under other statutes, however, it is required that the matters must be stated as of fact,⁵ and not to the best of affiant's knowledge.⁶ An affidavit on knowledge and belief is not a *sworn* statement.⁷ Unless the statute specifically requires that the owner shall personally make the affidavit,⁸ it can be sworn to by any one who knows the facts.⁹ Officers who are usually authorized to administer

ment is true, though to this is added, "to the best of his knowledge and belief." *Grace v. Oakland Bldg. Assn.*, 166 Ill. 637, 46 N. E. 1102. Sufficient if he follows the language of the statute. *Union Stove Works v. Klingham*, 20 App. Div. (N. Y.) 449, 46 N. Y. Supp. 721.

⁴ *Missouri*.—*Finley v. West*, 51 Mo. App. 569; *Crane Co. v. Epworth Hotel Construction and Real Estate Co.*, 121 Mo. App. 2091, 98 S. W. 295.

Nebraska.—*Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 779.

New York.—*Moore v. McLaughlin*, 66 Hun (N. Y.) 133, 21 N. Y. Supp. 55; *Staubsandt v. Lennon*, 3 Misc. (N. Y.) 90, 22 N. Y. Supp. 544; *Kealey v. Murray*, 61 Hun (N. Y.) 619, 15 N. Y. Supp. 403.

⁵ *Childs v. Bostwick*, 12 Daly (N. Y.) 15, 65 How. Pr. (N. Y.) 146; *Conklin v. Wood*, 3 E. D. Smith (N. Y.) 662. The affidavit for a mechanic's lien required by 2 Sayles' Civ. St. Tex. 1897, art. 339b, must be made on affiant's knowledge; "the best of affiant's knowledge and belief" not being sufficient. *Merchants', &c., Bank v. Hollis*, 37 Tex. Civ. App. 479, 84 S. W. 269.

⁶ *Keogh v. Main*, 50 N. Y. Super. Ct. 183; *Conklin v. Wood*, 3 E. D. Smith (N. Y.), 662.

⁷ *Bender v. Stettinius*, 10 Ohio Dec. 186, 19 W. L. Bull. 163.

⁸ *Hugg v. Hintrager*, 80 Iowa, 359, 45 N. W. 1035; *Ainslie v. Kohn*, 16 Ore. 363, 19 Pac. 97.

⁹ *California*.—*Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146.

Ohio.—*St. Clair Building Assn. v. Hayes*, 2 Ohio Cir. Ct. 225, 1 Ohio Cir. Dec. 456.

Pennsylvania.—*Billmeyer &c., Co. v. Brubaker*, (1), (2), (3), 17 York (Pa.), 113, 114, 115.

South Dakota.—*Fullerton v. Leonard*, 3 S. Dak. 118, 52 N. W. 325.

United States.—*Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, 52 C. C. A. 165. A member of a firm. *Cunningham v. Barr*, 45 Kan. 158, 25 Pac. 583; *Deatherage v. Woods*, 37 Kan. 59, 14 Pac. 474. Or an agent. *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759; *Red River Lumber Co. v. Friel*, 7 N. Dak. 46, 73 N. W. 203; *Williams v. Webb*, 2 Disney (Ohio) 430. Or attorney for a foreign corporation may make the oath. *Huttig Bros. Mill, &c., Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073.

oaths may administer oath to the claimant.¹⁰ The fact that the person who administered the oath afterward became attorney of the claimant will not affect the validity of the claim.¹¹ It has been held that a notary public in another state may be a proper officer where his signature is witnessed by his official seal.¹² However, the official must act within his jurisdiction.¹³ As a general rule, although there are some decisions to the contrary,¹⁴ the omission of the name of the notary or his seal cannot be supplied by parol evidence.¹⁵ The rule in such cases is that the affidavit must show on its face the official character of the person who administers the oath.¹⁶ Generally if the oath is administered in a State other than that in which the statement is filed, the act of the officer should be

¹⁰ *Chandler v. Hanna*, 73 Ala. 390. A commissioner to administer oaths has no power to take an affidavit verifying a statement of claim to be filed. *Kelly v. McKenzle*, 1 Man. 169. Mechanic's lien claims may be verified before county recorders. *Arrington v. Wittenberg*, 12 Nev. 99.

¹¹ *Carr v. Hooper*, 48 Kan. 253, 29 Pac. 398; *McMongel v. Wilson*, 103 Mich. 264, 61 N. W. 495.

¹² *Wood v. St. Paul City Ry. Co.*, 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149; *Phelps Biglow Windmill Co. v. Shay*, 32 Neb. 19, 48 N. W. 896.

¹³ *Byrd v. Cochran*, 39 Neb. 109, 58 N. W. 127.

¹⁴ *Finley v. West*, 51 Mo. App. 569. Comp. St. § 5476, requiring the statement of account for a mechanic's lien to be "verified by affidavit," does not make the account necessarily invalid where the jurat is omitted, since it can be shown by parol evidence that the affidavit was properly made

by the affiant. *Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340.

¹⁵ *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338, 1 Am. St. 632; *Knight v. Elliott*, 22 Minn. 551; *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819; *Stetson, &c., Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 109.

¹⁶ *Cream City Furniture Co. v. Squier*, 2 Misc. (N. Y.) 438, 21 N. Y. Supp. 972. An affidavit verifying an account for a mechanic's lien, taken in Pennsylvania, to be used in Minnesota, the venue of which is a certain county in Pennsylvania and which merely shows that it was sworn to before "T. W. Taylor, Clerk, Q. S.," with a seal stamped "Quarter Sessions Court," is insufficient, since the affidavit should show on its face both the official character of the officer before whom it is sworn to, and his authority to administer oaths. *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918.

authenticated under the general Acts of Congress.¹⁷ Where the statement is filed in the office of the person administering the oath, it will not invalidate the claim if such official should fail to attach his seal.¹⁸ And under some statutes it is sufficient if the notary merely certifies that the "claimant made oath to the correctness of the account."¹⁹ Where copies are made and served, the fact that the jurat on the copy is deficient, will not affect the claim if it is correct in the original.²⁰ As a general rule, the verification is a part of the claim and can not be corrected after the time for filing of the statement is expired,²¹ and the question being jurisdictional, can be raised on trial.²²

§ 121. **Claim or statement—errors and defects.**—Courts are inclined to deal leniently with defects and errors that may appear in a claim or statement, and if they are only slight, and the meaning intended is evident and can easily be ascertained, they will be remedied.¹ No mistake will be considered material if enough remains to show a substantial compliance with

¹⁷ *Lockhead v. Berkeley Springs &c., Co.*, 40 W. Va. 553, 21 S. E. 1031. The failure of officer to sign jurat does not defeat. *Dobson v. Thurman*, 30 Ky. L. 1331, 101 S. W. 310.

¹⁸ *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863; *Laswell v. Presbyterian Church of Jefferson City*, 46 Mo. 279.

¹⁹ *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

²⁰ *Hassett v. Rust*, 64 Mo. 325.

²¹ *McGillivray v. District Tp.*, 96 Iowa, 629, 65 N. W. 974.

²² *Conklin v. Wood*, 3 E. D. Smith, (N. Y.) 662.

Cured by amendment.—Where the verification is defective merely because too restricted, the defect may be cured by amendment.

El Reno Electric Light, &c., Co. v. Jennison, 5 Okla. 759, 50 Pac. 144.

Not demurrable.—A complaint for lien is not demurrable on the ground that it does not appear that the seal of the notary before whom verification of the lien notice was taken was attached thereto, where the copy of the notice set out bears the word "seal" after the notary's name, but has no impression of his seal. *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

¹ *Alabama*.—*Lane &c., Co. v. Jones*, 79 Ala. 156.

California.—*McDonald v. Backus*, 45 Cal. 262.

Colorado.—*Bitter v. Mouat Lumber, &c., Co.*, 27 Colo. 120, 51 Pac. 519.

the statute, and that no one was misled.² If the error, however, is material, knowledge that another has a right will not cure the claimant's omission to assert his own right.³ The omission of a statutory requirement is a material and fatal one,⁴ which even a judgment will not cure; the condition is a condition precedent to the lien right, and is jurisdictional.⁵ Even if the error may otherwise be one which could be remedied, yet if it is a fraudulent misstatement, the court will de-

Iowa.—Green Bay Lumber Co. v. Miller, 98 Iowa 468, 62 N. W. 742.

Massachusetts.—Muto v. Smith, 175 Mass. 175, 55 N. E. 1041.

Minnesota.—Coughlan v. Longini, 77 Minn. 514, 80 N. W. 695; Miller v. Condit, 52 Minn. 455, 55 N. W. 47.

New York.—Tibbits v. Phipps, 30 App. Div. (N. Y.) 274, 51 N. Y. S. 954.

Pennsylvania.—Hays v. Tryon, 2 Miles (Pa.) 208. Under Code, § 3092, requiring that a statement of account be attached to the affidavit for a mechanic's lien setting forth the time when the different items thereon were furnished, mere inaccuracies in fixing the time do not defeat the lien. Johnson v. Otto, 105 Iowa 605, 75 N. W. 492. In a petition to enforce a mechanic's lien, the Christian name of the respondent was James, but the certificate stated it as "John," with a line drawn across the last three letters. The fact that name was erroneously recorded as John did not prevent an enforcement of the lien. Getchell v. Moran, 124 Mass. 404. Where a party has furnished materials for the im-

provement of real property, and in all respects has complied with the mechanic's lien law in respect thereto, his rights will not be destroyed, merely because, in taking a note for the amount due, he has described himself by the fanciful designation of the "Western Cornice Works," when there is no claim that, thereby, any one was misled or injured. Livesey v. Hamilton, 47 Neb. 644, 66 N. W. 644. See Dec. & Am. Dig. tit. Mechanics' Liens, § 157.

² Schroth v. Black, 50 Ill. App. 168; O'Shea v. O'Shea, 91 Mo. App. 221.

³ Chicago Lumber Co. v. Des Moines Driving Park, 97 Iowa 25, 65 N. W. 1017; Holmes v. Hutchins, 38 Neb. 601, 57 N. W. 514. If the form of a mechanic's lien is fatally defective, actual notice to parties claiming adversely to it will not cure the defect. In re Well's Estate, 2 Del. Co. (Pa.) 172; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729.

⁴ Denver Hardware Co. v. Croke, 4 Colo. App. 530, 36 Pac. 624 Luscher v. Morris, 18 Abb. N. Cas. (N. Y.) 67.

⁵ Holland v. Garland, 13 Phila. (Pa.) 544.

cline to remedy it.⁶ If the misstatement is clearly an immaterial one, it will not ordinarily affect the lien right.⁷ If inadvertently,⁸ or honestly made, and no one is wronged, the error is not fatal.⁹ Thus, even though the statute requires the date of the items to be given, yet if by accident and mistake without fraud the items are erroneously stated, and on the trial of the case the evidence shows that they were all furnished within the time limit, the lien would be enforced.¹⁰ If the parties have actual knowledge, they can not complain of errors in the dates, and if one item is within the time limit the lien will not

⁶ *Christian v. Allee*, 104 Ill. App. 177; *St. Croix Lumber Co. v. Davis*, 105 Iowa 27, 74 N. W. 756; *Hannah & Lay Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120; *Gibbs v. Hanchett*, 90 Mich. 657. We think the rule so generally established is a proper one, and should be adopted by this court. There certainly can be no hardship in requiring a claimant to avoid intentionally and wilfully making an exaggerated claim which he knows not to exist. The requirement that he shall truthfully state his claim is in no way unjust to the claimant, but it is pre-eminently just to the owner, to other claimants or lienors and to those who are engaged in administering the Lien Law. We are, therefore, of the opinion that the trial court, having found that the plaintiffs "enormously exaggerated" their claim and intentionally and by pretense of a fictitious contract sought to enforce and establish a false and fabricated demand, was justified in holding that the plaintiffs had thereby forfeited their right to re-

cover any judgment against the sureties upon the bond in question. *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296.

⁷ *Ringle v. Wallis Iron Works*, 4 Misc. (N. Y.) 15, 24 N. Y. Supp. 757.

⁸ *Ewing v. Stockwell*, 106 Iowa 26, 75 N. W. 657; *McAlister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887, 9 Det. Leg. N. 645; *Barnacle v. Henderson*, 42 Neb. 169, 60 N. W. 382.

⁹ *Illinois*.—*Kendall v. Fader*, 99 Ill. App. 104.

Iowa.—*Lee v. Hoyt*, 101 Iowa 101, 70 N. W. 95.

Missouri.—*Eau Claire-St. Louis Lumber Co. v. Fray*, 81 Mo. App. 337.

New York.—*American Mortg. Co. v. Butler*, 36 Misc. (N. Y.) 253, 73 N. Y. Supp. 334; *Ringle v. Wallis Iron Works*, 4 Misc. (N. Y.) 15, 24 N. Y. Supp. 757.

Oregon.—*Cooper Mfg. Co. v. Delahunt*, 36 Ore. 402, 60 Pac. 1.

¹⁰ *California*.—*Boscov v. Patton*, 136 Cal. 90, 68 Pac. 490.

Iowa.—*St. Croix Lumber Co.*

be absolutely void.¹¹ It has also been held that the fact that the claim was for more than is actually due, if not made with fraudulent intent, will not affect the validity of the lien.¹² And

v. Davis, 105 Iowa 27, 74 N. W. 756.

Maryland.—Treusch v. Shryock, 55 Md. 330.

Michigan.—Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545, 8 Det. Leg. N. 278.

Minnesota.—Coughlan v. Longini, 77 Minn. 514, 80 N. W. 695; Linne v. Stout, 41 Minn. 483, 43 N. W. 377.

Missouri.—Baltis v. Friend, 90 Mo. App. 408. Not within the true limit. May &c., Brick Co. v. General Engineering Co., 76 Ill. App. 380.

Different order.—Where, as against the owner of property one is entitled to lien for all the items included in his statement for lien, his entire right to lien as against an incumbrancer is not defeated on the ground that the statement was not just and correct, because some of the items were furnished under an order no items of which were furnished within 90 days of filing statement. Chase v. Garver Coal & Min. Co., 90 Iowa 25, 57 N. W. 648.

¹¹ Brockmeier v. Dette, 58 Mo. App. 607.

¹² **Alabama**.—Alabama &c., Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

California.—Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Harmon v. San Francisco &c., R. Co., 86 Cal. 617, 25 Pac. 124, 22 Pac.

407; Barber v. Reynolds, 44 Cal. 519.

Connecticut.—Marston v. Kenyon, 44 Conn. 349; Hopkins v. Forrester, 39 Conn. 351.

Illinois.—Rockwell v. O'Brien-Green Co., 62 Ill. App. 293.

Indiana.—Harrington v. Dollman, 64 Ind. 255.

Iowa.—Ewing v. Stockwell, 106 Iowa 26, 75 N. W. 657; Simonson Bros. Mfg. Co. v. Citizens' State Bank, 105 Iowa 264, 74 N. W. 995.

Massachusetts.—Smith v. Norris, 120 Mass. 58.

Michigan.—Hulburt v. Just, 126 Mich. 337, 85 N. W. 872, 8 Det. Leg. N. 46; Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386; Scheibner v. Cohnen, 108 Mich. 165, 65 N. W. 760; McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495; Lamont v. La Fevre, 96 Mich. 175, 55 N. W. 687.

Missouri.—Heamann v. Porter, 35 Mo. 137.

New York.—Gaskell v. Beard, 58 Hun (N. Y.) 101, 11 N. Y. Supp. 399; Morgan v. Taylor, 15 Daly (N. Y.) 304, 5 N. Y. Supp. 920.

North Dakota.—Turner v. St. John, 8 N. Dak. 245, 78 N. W. 340

Ohio.—Thomas v. Huesman, 10 Ohio St. 152.

Oregon.—Fitch v. Howitt, 32 Ore. 396, 52 Pac. 192; Allen v. Elwert, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54; Harrisburg Lumber

the same rule is applied where the description covers more land than should be included,¹³ provided that the property which is properly charged can be segregated from the excess.¹⁴ But if the party knowingly files a claim for a larger amount or knowingly confuses his items, it is not a "true and just statement" and is void.¹⁵ The claimant must exercise proper and reasonable care in his endeavor to make a true statement,¹⁶ and if the amount claimed should be excessively large,¹⁷ and no explanation is given of this fact, the presumption will be that

Co. v. Washburn, 29 Ore. 150, 44 Pac. 390.

Rhode Island.—Murphy v. Guisti, 22 R. I. 588, 48 Atl. 944.

United States.—Springer Land Assn. v. Ford, 168 U. S. 513, 42 L. ed. 561, 18 Sup. Ct. 170; Hooven, &c., Co. v. John Featherstone's Sons, 111 Fed. 81, 49 C. C. A. 229. Good as to items within time. Pace v. Yost, 9 Kulp (Pa.) 357. A notice of lien correctly stating the whole amount due plaintiff but inaccurate in stating that such amount was due on the original contract, whereas some of the articles were furnished on subsequent orders, is valid as to the value of the materials actually furnished under the contract stated in the notice, the mis-statement not being made with intent to deceive or defraud. Continental Building & Loan Assn. v. Hutton, 144 Cal. 609, 78 Pac. 21. A notice of mechanic's lien, filed before the completion of the work, including in the total amount unpaid all that is to become due, as well as what is already due, if it correctly states how much of the total belongs to each class (Laws N. Y.

1885, c. 342, § 4), could not fall within the condemnation visited upon knowingly false statements. Tibbits v. Phipps, 163 N. Y. 580, 57 N. E. 1126.

¹³ Shattuck v. Beardsley, 46 Conn. 386; Underwood v. Walcott, 3 Allen (Mass.) 464; Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413.

¹⁴ Othenin v. Brown, 66 Mo. App. 318.

¹⁵ Iowa.—Stubbs v. Clarinda C. S. &c., Co., 65 Iowa 513, 22 N. W. 654.

Massachusetts.—Hubbard v. Brown, 90 Mass. 590.

Missouri.—Uthoff v. Gerhard, 42 Mo. App. 256.

New York.—Aeschlimann v. Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148; New Jersey Steel & Iron Co. v. Robinson, 85 App. Div. (N. Y.) 512, 83 N. Y. Supp. 450.

¹⁶ Brennan v. Miller, 97 Mich. 185; Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691.

¹⁷ New Jersey Steel & Iron Co. v. Robinson, 83 N. Y. Supp. 450, 85 App. Div. (N. Y.) 512.

it is fraudulent.¹⁸ But if the excess is small,¹⁹ or there is a clear clerical error, there will be no such presumption.²⁰ The claim will be upheld if no one is prejudiced by the excessive claim or misstatement,²¹ unless there is a specific statutory provision that such a statement is void.²²

§ 122. Claim or statement—error and defects, continued.—

The mere fact that the claim contains items for materials that were not used in the building, will not defeat the lien.¹ And as a general rule it may be said that before the lien will be held void on this ground the items must have been inserted for

¹⁸ *Williams v. Daiker*, 63 App. Div. (N. Y.) 614, 71 N. Y. Supp. 247.

¹⁹ *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545, 8 Det. Leg. N. 278; *Pierson v. Jackman*, 47 App. Div. (N. Y.) 625, 62 N. Y. Supp. 1145.

²⁰ *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069.

²¹ *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157. A mechanic's lien was filed for \$9,150—the amount due if the contract had been carried out. The notice recited that all the materials for which the lien was claimed, had been furnished, except materials of a value not to exceed \$6,650. The amount actually due was \$2,500, and the release bond was for \$3,000. Held, that the lien was not fraudulent in exaggerating the amount due, and void, as the claim as to the amount due was a mistake, not harmful to the owners, as evidenced by the amount of the bond given. *Beattys v. Searles*, 74 App. Div. (N. Y.) 214, 77 N. Y. Supp. 497.

²² *Schallert-Ganahl Lumber Co. v. Neal*, 91 Cal. 362, 27 Pac. 743.

¹ *Michigan*.—*Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545, 8 Det. Leg. N. 278.

Missouri.—*Western Brass Mfg. Co. v. Mephram*, 2 Mo. App. 920, 64 Mo. App. 50.

New York.—*Pierson v. Jackman*, 27 Misc. (N. Y.) 425, 58 N. Y. Supp. 344; *Goodrich v. Gillies*, 32 Hun (N. Y.) 18, 31 N. Y. Supp. 76; *Gaskell v. Beard*, 58 Hun (N. Y.) 101, 11 N. Y. Supp. 399.

Washington.—*Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 534; *Peterman v. Milwaukee Brewing Co.*, 11 Wash. 199, 39 Pac. 452.

Tools.—The inclusion erroneously, but in good faith, in a materialman's notice of lien, of a claim for tools furnished the contractor with which to work on the building, does not invalidate the notice. *Evans v. Lower* 67 N. J. Eq. 232, 58 Atl. 294. Items in a claim for such material as did not enter into the structure of the building will be eliminated from the claim; such items will

a fraudulent purpose.² But if the statement is so glaringly untrue as to show gross negligence the presumption is that it is fraudulent, and this presumption is not excused on the ground of haste in drafting the statement.³ And so the mere inclusion of non-lienable items in the statement,⁴ if put there by mistake, and without wrong intent, will not vitiate the lien,⁵ unless the lienable and non-lienable items are so intermingled that they cannot be separated.⁶ Before the matter

not invalidate the whole claim.
Walter & Sons v. Powell, 13 Dist. (Pa.) 667.

² *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Midland Lumber Co. v. Kreeger*, 52 Mo. App. 418; *Goodrich v. Gillies*, 66 Hun (N. Y.) 422, 21 N. Y. Supp. 400.

³ *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195; *Williams v. Dalker*, 33 Misc. (N. Y.) 70, 68 N. Y. Supp. 348.

⁴ *Connecticut*. — *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325.

Iowa. — *Nancolas v. Hitaffer*, 136 Iowa 341, 112 N. W. 382.

Minnesota. — *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695.

Missouri. — *Walden v. Robertson*, 120 Mo. 38, 25 S. W. 349; *Allen v. Frumet Mining & Smelting Co.*, 73 Mo. 688; *Price v. Merritt*, 55 Mo. App. 640; *Pullis v. Hoffman*, 28 Mo. App. 666; *Johnson v. Barnes & Morrison Bldg. Co.*, 23 Mo. App. 546.

Nevada. — *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090.

Pennsylvania. — *Simpson v. Cameron*, 3 Pa. Dist. 612, 25 Pittsb. Leg. J. 62.

Wisconsin. — *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

⁵ *Wolfley v. Hughes*, 8 Ariz. 203, 71 Pac. 951; *Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115.

⁶ *Arizona*. — *Wolfley v. Hughes*, 8 Ariz. 203, 71 Pac. 951.

California. — *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273.

Colorado. — *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456.

Maine. — *Baker v. Fessenden*, 71 Me. 292.

Missouri. — *Edgar v. Salisbury*, 17 Mo. 271; *O'Brien Boiler Works Co. v. Haydock*, 59 Mo. App. 653; *Dugan Cut Stone Co. v. Gray*, 43 Mo. App. 671; *Schulenburg & Boeckler Lumber Co. v. Strimple*, 33 Mo. App. 154; *McLaughlin v. Schawacker*, 31 Mo. App. 365; *Murphy v. Murphy*, 22 Mo. App. 18; *Nelson v. Withrow*, 14 Mo. App. 270.

Oregon. — *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54.

South Dakota. — *Stokes v. Green*, 10 S. Dak. 286, 73 N. W. 100. The fact that a claim of lien for material used in a building includes material used in a sidewalk around the lot on which the building is located will not invalidate the lien, where an itemized statement in the claim renders it possible to determine

was changed by statute the Massachusetts courts held, however, that the commingling of such items, even if separable, would not be a "true account of the debt,"⁷ but later, under other statutes, they held otherwise.⁸ The general rule where the matters are separable is that the lien may be enforced to the extent of the lienable items.⁹ The mere fact alone that lienable and non-lienable items are included in one statement, is no evidence of fraud.¹⁰ But if the claim is grossly exorbitant and manifestly ill-founded,¹¹ or the non-lienable items are knowingly included,¹² the presumption is that they were fraudulently inserted, and this fact may vitiate the entire lien.¹³ Where lienable and non-lienable items have been put in a lien statement, and no fraud is shown and payments have been made which have not been applied by the parties, the courts will apply them to the non-lienable items first.¹⁴ The fact that the statement includes the names of persons having no interest in the matter will not invalidate it.¹⁵ As a person making out an account ought to know what credits are justly due thereon, the courts have been somewhat less inclined to

the exact amount used in the sidewalk, and the precise amount charged therefor. *Harrisburg Lumber Co. v. Washburn*, 29 Ore. 150, 44 Pac. 390; *Cochran v. Baker*, 34 Ore. 555, 56 Pac. 641.

⁷ *Truesdall v. Gay*, 13 Gray (Mass.) 311.

⁸ *Hubbard v. Brown*, 8 Allen, (Mass.) 590; *Whitford v. Newell*, 2 Allen, (Mass.) 424; *Parker v. Bell*, 7 Gray (Mass.) 429.

⁹ *Gordon Hardware Co. v. San Francisco, &c., R. Co.*, 86 Cal. 620, 25 Pac. 125; *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. 772; *Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110; *McCristal v. Cochran*, 147 Pa. St. 225, 23 Atl. 444;

Waymard v. Mining Co., 30 Pittsb. Leg. J. (N. S.) (Pa.) 96.

¹⁰ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712. See Dec. & An. Dig. tit. Mechanic's Liens, § 157.

¹¹ *Bank v. Redman*, 57 Me. 405; *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21.

¹² *Stubbs v. Railroad Co.*, 65 Iowa 513, 22 N. W. 654; *Lynch v. Cronan*, 6 Gray (Mass.) 531.

¹³ *Boller Works Co. v. Haydock*, 59 Mo. App. 653; *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54.

¹⁴ *Cuer v. Ross*, 49 Wis. 652, 6 N. W. 331.

¹⁵ *Interstate Building & Loan Assn. v. Ayers*, 71 Ill. App. 529.

excuse an omission of credits, even if left out by mistake, than other omitted or mistaken matters, and they generally hold that an omission of a proper credit is a fraud which will vitiate the statement.¹⁶ But even the omission of certain items of credit, if the mistake did not work a fraud on anyone, may be excused. In such a case all the facts should be submitted for determination in the trial of the case.¹⁷ If the statement is made in good faith and the omission occurs without wilfulness or neglect,¹⁸ and especially where the transactions are numerous, this fact will not ordinarily defeat a recovery on the statement.¹⁹ The parties interested might waive errors in the statement or so act as to cure them where there is no fraud, and the parties to be charged are fully informed of what is meant and intended.²⁰ It has been held, for example, that a party who rejects or specifically contests a claim on one ground cannot complain of other defects therein.²¹ So if objection to defects is not made on trial, it is held to amount to a waiver of them, and the objection cannot be made thereafter.²² The fact that the defendants put in evidence the claim as filed

¹⁶ *Lane & Bodley Co. v. Jones*, 79 Ala. 156; *Lynch v. Cronan*, 6 Gray, Mass. 531; *Hoffman v. Walton*, 36 Mo. 613; *Nicolai Bros. Co. v. Van Fridagh*, 23 Ore. 149, 31 Pac. 288. Not invalidated unless in bad faith. *Culmer v. Calne*, 22 Utah 216, 61 Pac. 1008.

¹⁷ *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367; *Schroeder v. Mueller*, 33 Mo. App. 28.

¹⁸ *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034, 8 Det. Leg. N. 458; *Rowland v. Harmon*, 24 Ore. 529, 34 Pac. 357.

¹⁹ *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422. Portions of th

statement of a mechanic's lien relating to matters not recoverable as such may be treated as surplusage. *Day v. Chapman*, 88 Ill. App. 358.

²⁰ *Bastrup v. Prendergast*, 179 Ill. 553, 53 N. E. 995.

²¹ *Buckley v. Taylor*, 51 Ark., 302, 11 S. W. 281. Under the law of 1851, after the defendant has appeared and contested the claim upon the ground that nothing was due by him to the contractor, it does not lie with him to object that the name of the contractor was not in the notice of the claim. *McBride v. Crawford*, 1 E. D. Smith (N. Y.) 658.

²² *Barrall v. Ruberry*, 9 Kulp (Pa.) 285; *Baker v. Winter*, 15

does not prevent them from showing that it is defective.²³ But as a general rule, when a paper is put in evidence, objections must then be made to its sufficiency, or they will be deemed waived.²⁴ So in like manner objectionable matters set out in the pleadings are deemed waived if not denied.²⁵ It is held to be a fatal variance where the pleading alleges that all the work was done under one contract and the evidence shows that it was done under separate contracts.²⁶

§ 123. **Claim or statement—amendment.**—As a general rule a claim or statement cannot be amended after the time limit for filing the same had expired,¹ and the amendment should not be allowed where it will materially interfere with intervening rights.² If no one is prejudiced by the proposed amend-

Md. 1; *Boyd v. Bassett*, 61 Hun (N. Y.) 624, 16 N. Y. Supp. 10.

²³ *Harman v. Cummings*, 43 Pa. St. 322.

²⁴ *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709.

²⁵ *McGinty v. Morgan*, 122 Cal. 103, 54 Pac. 392.

²⁶ *Hooven, Owens & Rentschler Co. v. Featherstone*, 99 Fed. 180.

¹**Illinois.**—*May, Purlington & Bonner Brick Co. v. General Engineering Co.*, 180 Ill. 535, 54 N. E. 638.

Missouri.—*Barnett v. Clooney*, 68 Mo. App. 146, 67 Mo. App. 664.

New York.—*Maurer v. Bliss*, 14 Daly (N. Y.) 150.

Pennsylvania.—*Wrought-Iron Bridge Co. v. York Mfg. Co.*, 11 York Leg. Rec. (Pa.) 45; *Lee v. Exeter Club*, 9 Kulp (Pa.) 209.

Washington.—*Brown v. Trimble*, 48 Wash. 270, 93 Pac. 317.

Wisconsin.—*Allfree Manufg. Co. v. Henry*, 96 Wis. 327, 71 N.

W. 370; *Mark Paine Lumber Co. v. Douglas County Imp. Co.*, 94 Wis. 322, 68 N. W. 1013. See Dec. & Am. Dig. tit. Mechanics' Liens, § 158.

²*Wade v. Reitz*, 18 Ind. 307; *J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co.*, (N. J. L.) 68 Atl. 215. A notice to acquire a mechanic's lien cannot be reformed, as a mortgage created by the owner can be, to make it conform to intention. *Hill v. Stagg*, 1 Wils. 403. A mechanic's lien statement, as to third persons who have acquired rights and interests in the land covered thereby adverse to the lien claimant, cannot be amended to the prejudice of the rights of such third persons after it has been filed in the office of the register of deeds, and after the expiration of the time limited by statutes for filing of the same. *Meehan v. St. Paul, M. etc., R. Co.*, 83 Minn. 187, 86 N. W. 19;

ment, it will generally be allowed under equitable principles.³ Indeed, some statutes particularly authorize the amendment of statements in cases where justice may be subserved thereby,⁴ and such statutes have been held to be constitutional.⁵ But without a statutory provision to that effect courts have

Williams v. Bradford (N. J. Eq.) 21 Atl. 331; *In re Wells' Estate*, 2 Del. Co. (Pa.) 172. Under Gen. Laws (R. I.) 1896, c. 206, providing that a mechanic's lien originates when the work begins and becomes operative when the first notice is given, and will be lost, unless followed by legal process, an omission in the notice is jurisdictional, and cannot be amended. *Hawkins v. Boyden*, 25 R. I. 181, 55 Atl. 324. Especially is this true if any one is prejudiced thereby. *Richardson v. Central Lumber Co.*, 112 Ill. App. 160; *McGillivray v. Case*, 107 Iowa 17, 77 N. W. 483; *Wetmore v. Royal*, 55 Minn. 162, 56 N. W. 594; *Bohem & Bros. v. Seel*, 185 Pa. St. 382, 39 Atl. 1009, 42 W. N. C. 115.

³No one prejudiced. *Livezey v. Qualey*, 14 Montg. Co. Law Rep'r, (Pa.) 205; *Aldine Mfg. Co. v. Butler*, 9 Kulp (Pa.) 33; *Darlington v. Eldridge*, 88 Mo. App. 525. Subrogation of rights. *Alberti v. Moore* (Okla.) 93 Pac. 543.

⁴*Maryland*. — *Real Estate & Improvement Co. v. Phillips*, 90 Md. 515, 45 Atl. 174.

Oklahoma. — *El Reno Electric Light & Telephone Co. v. Jenkinson*, 5 Okla. 759, 50 Pac. 145.

Pennsylvania. — *Linden Steel Co. v. Imperial Refining Co.*, 138 Pa. 10, 20 Atl. 867, 869, 9 L. R. A.

863; *Dill v. Gaughan*, 9 Kulp (Pa.) 384; *Benore v. Leonard*, 6 Lack. Leg. N. (Pa.) 52, 9 Pa. Dist. 211.

Rhode Island. — *Murphy v. Guisti*, 26 R. I. 306, 58 Atl. 952.

Wisconsin. — *Lentz v. Elmermann*, 119 Wis. 492, 97 N. W. 181; *Mark Paine Lumber Co. v. Douglas Co. Imp. Co.*, 94 Wis. 322, 68 N. W. 1013. Under Mechanics' Lien Law, § 14, allowing amendments to lien claims on notice and application of the claimants, a lien claim may be amended in any particulars which do not enlarge the claim either in amount, in the estate to be charged, or in the persons to be affected, though the time for filing a new claim has expired, providing judgment has not been entered on the claim. *American Brick & Tile Co. v. Drinkhouse*, 59 N. J. L. 462, 36 Atl. 1034. Requisites of Amendment. An affidavit that a proposed amendment sought to be filed to a mechanic's lien was "conducive to justice and a fair trial on the merits," should show specifically wherein the record or paper on file is defective, incorrect, or wanting in particularity or substance. *Wrought-Iron Bridge Co. v. York Mfg. Co.*, 11 York Leg. Rec. (Pa.) 45.

⁵*Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640.

no right to permit defects in claims or statements to be cured by matters set up in the pleadings.⁶ And where the statutes permit such amendments, they do not act retrospectively,⁷ nor will they be applied to mechanic's lien statements, unless the statutes specifically so provide.⁸ More cannot be recovered than is claimed in the statement.⁹ Since there is no general power to amend, the question as to what defects are amendable must be determined solely by the statute that permits them to be made. As a general rule any error may be corrected by amendment or by filing a new claim before the time limit has expired,¹⁰ but not afterwards.¹¹ However, a bona fide purchaser without notice can not be affected by such an amendment.¹² Of course immaterial defects, inadvertently made, where no one is prejudiced, are always amendable.¹³ Under

⁶ *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304; *May, Purington & Bonner Brick Co. v. General Engineering Co.*, 180 Ill. 535, 54 N. E. 638; *Morrison, Merrill & Co. v. Willard*, 17 Utah 306, 53 Pac. 832. The appearance of defendants in proceedings to foreclose a lien does not waive a defect in the notice of the claim. *Beals v. Congregational B'nai Jeshurun*, 1 E. D. Smith (N. Y.) 654.

⁷ *Drinkhouse v. American Brick & Tile Co.*, 29 Vroom (N. J. L.) 432, 33 Atl. 950; *Vreeland v. Bramhall*, 10 Vroom (N. J. L.) 1; *Fahnestock v. Willson*, 95 Pa. 301; *Spare v. Walz*, 14 Phila. (Pa.) 132.

⁸ *Meehan v. St. Paul, M. R. Co.*, 83 Minn. 187, 86 N. W. 19.

⁹ *Harris v. Page*, 23 R. I. 440, 50 Atl. 859.

¹⁰ *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W.

811; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Vreeland v. Boyle*, 8 Vroom (N. J. L.) 346.

¹¹ *McFarland v. Schultz*, 168 Pa. 634, 32 Atl. 94.

¹² *Armstrong v. Hallowell*, 35 Pa. 485. A petition for a mechanic's lien, which was in good faith filed within the time required by law, described the premises incorrectly. It was held proper to permit an amendment of the petition as against all persons who had not in the meantime acquired vested rights in respect to the premises; *Rev. St. (Wis.)*, § 3320, authorizing an amendment of the petition in a lien case. *Sherry v. Schraage*, 48 Wis. 93, 4 N. W. 117.

¹³ *Schaeffer v. Rohrbach*, 1 Wilcox (Pa.) 250. The failure of the notary before whom a lien claim was sworn to state his place of residence after his signature and official title, as required by 1 Hill's Ann. Code,

a statute requiring apportionment of amounts where a lien is filed on several buildings, and this was not done, an amendment was permitted apportioning the same.¹⁴ So an amendment was allowed where the claim did not name all the debtors,¹⁵ or did not name them correctly.¹⁶ Where the statute permits amendments they should be made as the statute requires.¹⁷ If properly amended, the statement becomes the same as a new and valid one,¹⁸ but not so where fraudulently or falsely made.¹⁹ And even if the errors are honestly made the claimant may be estopped from amending to his advantage.²⁰

Wash., § 333, may be remedied by amendment, under Laws (Wash.) 1893, p. 34, § 5, permitting amendments where the interests of third persons are not affected. *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38; *Whittier v. Stetson & Post Mill Co.*, 6 Wash. 190, 33 Pac. 393.

¹⁴*James v. Van Horn*, 10 Vroom (N. J. L.) 353; *Hoffmaster v. Knupp*, 15 Pa. Co. Ct. (Pa.) 140.

¹⁵*Hubbell v. Schreyer*, 4 Daly (N. Y.) 362, 14 Abb. Pr. (N. Y.) 284.

¹⁶*Gebhard v. Levering*, 14 Phila. (Pa.) 120; *Jones v. Philler*, 13 Pa. Co. Ct. (Pa.) 232; *Hoffa v. Homestead Bldg. Ass'n*, 3 Pa. Dist. (Pa.) 566.

¹⁷A sub-contractor, seeking to enforce a mechanic's lien, filed a statement which omitted the owner's name, to which was attached a verification signed, "B., per G., claimant." It was, two months after, changed, without authority, by interlineation, inserting the owner's name, and making the signature read: "G.

W. G., agent for claimant." Held, that a complete verified statement, required by Civ. Code (Kan.), art. 27, § 3, to contain the "name of the contractor, name of the claimant," etc., was not filed. *Newman v. Brown*, 27 Kan. 117; *Dorman v. Crozier*, 14 Kan. 224. The amendments of the mechanic's lien authorized by section 14 of the mechanic's lien law need not be sworn to. *Drinkhouse v. American Brick & tile Co.*, 29 Vroom (N. J. L.) 432, 33 Atl. 950.

¹⁸A defective mechanic's lien, filed and corrected within the statutory period for filing, the clerk indorsing on the record the circumstances of the alteration, becomes thereupon a new and valid lien. *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748; *Armstrong v. Hallowell*, 35 Pa. 485.

¹⁹*May, Purington & Bonner Brick Co. v. General Engineering Co.*, 76 Ill. App. 380.

²⁰*Canton Roll & Machine Co. v. Rolling Mill Co.*, 155 Fed. 321.

124. Claim or statement—Cancellation.—It is a well recognized doctrine of equity that where there is a defective lien on one's property, equity will decree a cancellation of the same if the law provides no relief.¹ Where, however, the statute specifically provides a method for getting rid of an erroneous claim or statement, such provision must be followed.² Under the Pennsylvania practice, where the lien statement is defective, the proper procedure is to file a motion to strike it off.³ In such a motion all objections the movant may have should be stated,⁴ and it will only be allowed when the lien statement is plainly defective on its face.⁵ A mere defect in a single item,⁶

¹ See §§ 189-193. See Dec. & Lehman v. Thomas, 5 Watts & Am. Dig. tit. Mechanics' Liens, S. (Pa.) 262.
§ 160.

² Baker v. Winter, 15 Md. 1. A general allegation is insufficient. McGuckin v. Coulter, 33 N. Y. Super. Ct. (1 Jones & S.) 324, 10 Abb. Pr. (N. S.) 128. The proceedings cannot be brought before the time specified. Fettrich v. Totten, 2 Abb. Prac. (N. S.) (N. Y.) 264; Madden v. Lennon, 23 Misc. Rep. (N. Y.) 79, 50 N. Y. Supp. 690.

³ Scholl v. Gerhab, 93 Pa. 346; Lybrandt v. Eberly, 36 Pa. 347; Wolfe v. Keeley, 9 Pa. Dist. (Pa.) 515, Mitchell v. Martin, 3 Pittsb. (Pa.) 474. Under section 23 of the Act of June 4, 1901, an owner may proceed by petition and rule to strike off the lien. Este v. Penna. R. R. Co., 13 Dist. (Pa.) 451; Harner v. Thomas, 10 Dist. (Pa.) 487. The court has discretionary power. Gerard v. Ecker, 33 Pitts. (Pa.) 293, 12 Dist. (Pa.) 332. Earlier it was held that the court has power.

⁴ Benore v. Leonard, 6 Lack. Leg. N. (Pa.) 198.

⁵ Frick v. Gladdings, 30 Leg. Int. (Pa.) 321, 5 Leg. Gaz. 317, 10 Phila. (Pa.) 79; Hoffmaster v. Knupp, 15 Pa. Co. (Pa.) 140. The court will not strike off a mechanic's lien on certain houses, though part of the material for which the lien was acquired was supplied to houses separated by a public street from the houses to which the lien attached, where such fact does not appear from the face of the record, but is only ascertainable by examining other claims filed by the same claimant against the same property owner. Jeffers v. Anderson, 7 Pa. Dist. R. 482, 21 Pa. Co. Ct. 294.

⁶ McCristal v. Cochran, 147 Pa. 225, 23 Atl. 444, 29 W. N. Cas. 340. Defective items in a claim for a lien may be stricken out without affecting items correctly stated. Lee v. Exeter Club, 9 Kulp (Pa.) 209.

or a failure to apportion between several houses,⁷ or that some third person claims the property will not suffice.⁸ After a plea has been made by defendant it is generally regarded as too late to move to strike off.⁹ But some statutes recognize the practice of entertaining a motion to strike off where the lien statement is defective, after an action to enforce the same has been commenced.¹⁰

⁷*Pace v. Yost*, 9 Kulp (Pa.) 357; *May v. Creasi*, 8 Kulp (Pa.) 360.

⁸*Cutter v. Magaw*, 23 Pa. Co. Ct. (Pa.) 475. The contractor has no standing to demand that a lien filed by a sub-contractor shall be stricken off for any reason. *Cordes v. Ralston*, 12 Dist. (Pa.) 438.

⁹*Whitman v. Wilkes-Barre Deposit & Savings Bank*, 9 Kulp (Pa.) 512, 17 Lanc. L. Rev. (Pa.) 107; *Connell v. Nicol*, 2 Lack. Leg. N. (Pa.) 177; *Thorn Bros. v. Shields*, 8 Pa. Dist. (Pa.) 129.

¹⁰Code Civ. Proc. (N. Y.) § 3417, provides that a mechanic's lien on real estate may be vacated and canceled by order of a court of record, if the lienor, after 30 days'

notice in writing, shall not commence an action to enforce the same; and Lien Law, art. 1, § 22 (Laws 1897, p. 525, c. 418), provides that the article relating to mechanics' lien shall be liberally construed, and that a substantial compliance with its provisions shall be sufficient. Held, that section 3417 was not a statute of limitations, but vested the court with discretion as to whether or not a lien should be vacated for failure of the lienor to bring his action within the time provided. *William H. Jackson Co. v. Haven*, 87 App. Div. (N. Y.) 236, 84 N. Y. Supp. 356; *In re Burstein*, 68 N. Y. Supp. 742; *Prior v. White*, 32 Hun (N. Y.) 14.

CHAPTER IV.

OPERATION AND EFFECT OF PERFECTED LIEN.

- | Sec. | Sec. |
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| 125. Generally. | 145. Priority between mechanics and material men—Assignment of contract. |
| 126. Amount covered by lien statement. | 146. Generally no priority by reason of time of furnishing work or material. |
| 127. Amount limited by contract. | 147. Equality of liens upon same job—Ohio statute. |
| 128. Amount subject to sub-contractor's claim. | 148. Pro rata payment of subcontractors out of subsequent payments due head contractor—Ohio statute. |
| 129. Amount and extent of lien as to time of commencement. | 148a. Priority—Indiana statute. |
| 130. Amount and extent—Commencement of work. | 149. Priority affected by conveyances. |
| 131. Amount and extent—Duration of lien. | 150. Priority affected by conveyance during progress of work. |
| 132. Property reached by lien. | 151. Priority—Liens and incumbrances. |
| 133. Extent of tract of land covered by lien. | 152. Priority — Dower, curtesy, taxes. |
| 134. Extent of tract of land covered by lien—Continued. | 153. Priority—Debts of decedents, buildings and improvements. |
| 135. Lot of land covered by lien. | 154. Priority—Judgments, attachments, executions. |
| 136. Land covered by lien—Several houses on tract. | 155. Priority—Mortgages. |
| 137. Lien on contiguous lots—Ohio statute. | 156. Priority — Mortgages given before making contract or commencement of work. |
| 138. Building, fixtures and appurtenances, covered by lien. | 157. Priority — Mortgages given after making contract or commencement of work. |
| 139. Estate or interest in land covered by lien. | 158. Priority — Mortgages after commencement of work or before material furnished. |
| 140. Interest or estate of contracting owner covered by lien. | 159. Priority — Mortgages given before lien attaches. |
| 141. Leaseholds covered by lien. | |
| 142. Community property covered by lien—Homestead. | |
| 143. Lien on interest of landlord or vendor for improvements made by tenant or purchaser. | |
| 144. Priority between mechanics and material men. | |

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| 160. Priority—Mortgages—Future advances. | 162. Priority—Mortgages—Improvements. |
| 161. Priority—Mortgages—Record of—Estoppel—After acquired property. | 163. Priority—Vendor's lien. |
| | 164. Priority—Purchase money mortgages. |

§ 125. **Generally.**—In the preceding chapters we have considered the origin and nature of the lien,¹ the conditions giving the right to the lien,² and the proceedings necessary on the part of the claimant to acquire a valid lien.³ This brings us to a consideration of the operation and effect of the lien,—assuming that the conditions precedent are such that a lien will attach. These matters will be considered in this chapter. Necessarily the questions involved are those which after action is brought, come up on a distribution of proceeds, and this will be further considered when that subject is reached.⁴

§ 126. **Amount covered by lien statement.**—One of the first questions involved in considering the operation and effect of the perfected lien is the amount of money or other consideration that is covered by the lien statement filed or other executed condition precedent. Assuming that all these conditions precedent have been properly performed, the amount covered will depend upon the contract between the parties.¹ If there is no contract fixing the value of the services or material furnished, then the reasonable value of the same will determine the amount that the lien covers,² to which may be added a proper and reasonable profit.³ Sometimes the statute fixes the amount to be held subject to the lien as the amount of moneys due at the time a certain thing is done, as the giving of notice

¹ Chap. 1.

² Chap. 2.

³ Chap. 3.

⁴ See § 293.

¹Broyhill v. Galtner, 119 N. Car. 443, 26 S. W. 31; Summerville v. King, 98 Tex. 332, 83 S. W. 680.

See Dec. & Am. Dig. tit. Mechanics' Liens, § 161.

²Sierra Nevada Lumber Co. v. Whitmore, 24 Utah 130, 66 Pac. 779.

³Smith v. Wilcox, 44 Ore. 323, 74 Pac. 708, 75 Pac. 710.

or matters of like character.⁴ But this may only affect the owner; if more afterward becomes due, this may be held subject to the lien.⁵ However, it can not be made to cover moneys due on matters not relating to the building operations, nor for items that are non-lienable.⁷ The general rule is that such sums will be included as were contemplated by the original contract.⁸ If the work is not entirely performed the doctrine that partial failure will avoid the entire contract is not applied,⁹ and the lien will cover the amount due less that which is required to perform the contract as required by its stipulations.¹⁰ If the claimant is wrongfully discharged his lien will cover the amount due for the work done, taking into consideration the stipulated price.¹¹ Where the owner is liable to a

⁴*Protective Union v. Nixon*, 1 E. D. Smith (N. Y.) 671. Where the notice of the subcontractors' lien does not cover labor to be performed or material to be furnished, they are not entitled to a lien for labor and materials furnished after filing the lien. *Hutton Bros. v. Gordon*, 2 Misc. (N. Y.) 267, 23 N. Y. Supp. 770. The lien given by Act (Pa.) 1872, to the wages of laborers, does not extend to wages earned after the levy. *Schrader v. Burr*, 10 Phila. (Pa.) 620, 31 Leg. Int. (Pa.) 405.

⁵*Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *White v. Livingston*, 69 App. Div. (N. Y.) 361, 75 N. Y. Supp. 466.

⁷*Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. 138; *Pardue v. Missouri Pac. R. Co.*, 52 Neb. 301, 71 N. W. 1022, 66 Am. St. 489; *Spalding v. Burke*, 33 Wash. 679, 74 Pac. 829.

⁸*German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314; *Boyd v. Mole*, 9 Phila. (Pa.) 118, 30 Leg. Int. (Pa.) 116.

⁹See § 49.

¹⁰*District of Columbia—Beha v. Ottenberg*, 6 Mackey (D. C.) 348. *Illinois—Sohns v. Murphy*, 168 Ill. 346, 48 N. E. 52.

Massachusetts—Orr v. Fuller, 172 Mass. 597, 52 N. E. 1091.

New York—White v. Livingston, 174 N. Y. 538, 66 N. E. 1118; *Charlton v. Scoville*, 68 Hun (N. Y.) 348, 22 N. Y. Supp. 883.

Nebraska—Millsap v. Ball, 30 Neb. 728, 46 N. W. 1125.

¹¹*Rome Hotel Co. v. Warlick*, 87 Ga. 34, 13 S. E. 116; *Watrous v. Davies*, 35 Ill. App. 542; *Hale v. Johnson*, 6 Kan. 137; *Landykowski v. Martyn*, 93 Mich. 575, 53 N. W. 781. In such cases, neither party is to be allowed any advantage from his own wrong. *Thomas v. Stewart*, 132 N. Y. 580, 30 N. E. 577.

person with whom he has made no direct contract, he will be liable for the reasonable value of the labor and materials.¹² And this will be the case where the fund is insufficient to satisfy the claim.¹³ The amount that is covered by the lien will also include interest from the time that the obligation is due.¹⁴ And if usurious interest has been agreed upon the penalties attaching to that kind of interest will be applied.¹⁵

§ 127. **Amount limited by contract.**—As a general rule, where the parties fix the value of their work and materials by contract, that will be the amount covered by the lien.¹ And

¹²*Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354.

¹³*Arkansas*.—*Basham v. Toors*, 51 Ark. 309, 11 S. W. 282.

Indiana.—*Morris v. Louisville, Etc., R. Co.*, 123 Ind. 489, 24 N. E. 335; *Merritt v. Pearson*, 58 Ind. 385.

Massachusetts.—*Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413.

Missouri.—*Deardorff v. Everhartt*, 74 Mo. 37; *Miller v. Whitelaw*, 28 Mo. App. 639.

Pennsylvania. — *Cattanach v. Ingersoll*, 11 Pa. L. J. 345.

¹⁴*Colorado*.—*Hurd v. Tomkins*, 17 Colo. 394, 30 Pac. 247; *Clear Creek, &c., Gold, &c., Min. Co. v. Root*, 1 Colo. 374.

Illinois.—*McDonald v. Patterson*, 186 Ill. 381, 57 N. E. 1027.

Indiana.—*Merritt v. Pearson*, 76 Ind. 44.

Maryland.—*Smith v. Shaffer*, 50 Md. 132.

New York. — *McConologue v. Larkins*, 32 Misc. (N. Y.) 166, 66 N. Y. Supp. 188.

Oregon.—*Forbes v. Willamette Falls Electric Co.*, 19 Ore. 61, 23

Pac. 670, 20 Am. St. 793; *Willamette Falls Transp. & Mill Co. v. Riley*, 1 Ore. 183.

Wisconsin.—*Bailey v. Hull*, 11 Wis. 289, 78 Am. Dec. 706. Need not show delay. *Merritt v. Crane Co.*, 126 Ill. App. 337; judgment modified, 225 Ill. 181, 80 N. E. 103. Demand must be liquidated. *Fox v. Davidson*, 111 App. Div. (N. Y.) 174, 97 N. Y. Supp. 603; *Sorg v. Crandall*, 129 Ill. App. 255, judgment affirmed *Lowden v. Sorg*, 233 Ill. 79, 84 N. E. 181. The fact that a lien will be enforced against a party other than the one who made the contract with the lien claimant, does not preclude the allowance of interest. *Sorg v. Crandall*, 129 Ill. App. 255, judgment affirmed *Lowden v. Sorg*, 233 Ill. 79, 84 N. E. 181.

¹⁵*Sproule v. McFarland* (Tex. Civ. App.) 56 S. W. 693.

¹*Trammell v. Hudmon*, 78 Ala. 222; *Canady v. Webb* (Ky.), 80 S. W. 172, 25 Ky. L. 2107; *Dengler v. Auer*, 55 Mo. App. 548. Extras within the original contract will be included. *Zollars v. Snyder* (Tex. Civ. App.), 94 S. W. 1096.

if the amount is to be determined by a per cent., and the work is cut down, the amount will be proportionately reduced.² Where there has been neither fraud nor collusion,³ and the owner is not directly liable, either by contract or statute,⁴ the amount of the lien of a subcontractor cannot exceed the balance due from the owner to the contractor.⁵ If the owner is liable, independent of his contract with the contractor,⁶ then the value of the materials furnished will control the amount subject to the lien.⁷ All, however, must be within the limit of the

²*Rinn v. Electric Power Co. of Salem Island*, 3 App. Div. (N. Y.) 305, 38 N. Y. Supp. 345. Where a contract stipulated for a lien, it will not necessarily be held to mean a mechanic's lien. *Lippencott v. York*, 86 Tex. 276, 24 S. W. 275.

³See § 58. *Mantonya v. Reilly*, 184 Ill. 133, 56 N. E. 425.

⁴See § 53. See Dec. & Am. Dig. tit Mechanics' Liens, § 162.

⁵*Alabama*.—*Trammell v. Hudson*, 78 Ala. 222; *Childers v. Greenville*, 69 Ala. 103.

California.—*Gibson v. Wheeler*, 110 Cal. 243, 42 Pac. 810; *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 289; *O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846.

Florida.—*Trustees of Wyly Academy v. Sanford*, 17 Fla. 162.

Iowa.—*Wickham v. Monroe*, 89 Iowa 666, 57 N. W. 434, *Parker v. Scott*, 82 Iowa 266, 47 N. W. 1073.

Kansas.—*Main Street Hotel Co. v. Horton Hardware Co.*, 56 Kan. 448, 43 Pac. 769.

Louisiana.—*McLaughlin v.*

Goodchaux, 7 La. Ann. 101; *Hall v. Wills*, 3 La. Ann. 504.

New Jersey.—*Craig v. Smith*, 8 Vroom (N. J. L.) 549.

New York.—*De Lorenzo v. Von Raitz*, 44 App. Div. (N. Y.) 329, 60 N. Y. Supp. 736; *Holley v. Van Dolsen*, 55 How. Pr. (N. Y.) 333; *Drake v. O'Donnell*, 49 How. Pr. (N. Y.) 25; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Spalding v. King*, 1 E. D. Smith (N. Y.) 717; *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625.

Pennsylvania.—*Campbell v. Scaife*, 1 Phila. (Pa.) 187.

Texas.—*Potshuiskey v. Krempkan*, 26 Tex. 307.

Utah.—*Teahen v. Nelson*, 6 Utah 363, 23 Pac. 764. The money which may remain in the hands of the owner, and due to the original contractor, after all deductions are made to which the owner is entitled, is the fund, and the only fund, out of which subcontractors are to be paid. *Culver v. Elwell*, 73 Ill. 536.

⁶See § 55.

⁷*Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47,

contract price.⁸ Under statutes which have made it obligatory upon the owner to record his contract and he has failed to do so, the amount has not been limited to that stipulated in the original contract, but to the reasonable value of the labor or materials.⁹ As to such indirect liens, generally the owner is liable and the lien covers the amount that was due at the time notice was given, or that might thereafter become due.¹⁰ Joint contractors cannot, without the assent of the owner, apportion what is due each of them, and in that manner limit the subcontractor of one or the other to the fund which was agreed as his share.¹¹ Where the fund remaining in the hands of the owner is not sufficient to pay all claims, it is distributed pro rata to those of an equal class.¹² And claims of the subcontractors will attach to what is due on all the buildings upon which they performed labor.¹³

10 S. W. 868, 3 L. R. A. 332; *Hilliker v. Francisco*, 65 Mo. 598; *Chilton v. Lindsay*, 38 Mo. App. 57.

⁸*Albright v. Smith*, 3 S. Dak. 631, 54 N. W. 816; *Rowell v. Harris*, 121 Ga. 239, 48 S. E. 948; *Green v. Farrar Lumber Co.*, 119 Ga. 30, 46 S. E. 62; *Sierra Nevada Lumber Co. v. Whitmore*, 24 Utah 130, 66 Pac. 779; *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.

⁹*Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

¹⁰*Alabama*.—*Greene v. Robinson*, 110 Ala. 503, 20 So. 65.

California.—*Blythe v. Poultney*, 31 Cal. 233; *Davis v. Livingston*, 29 Cal. 283; *Knowles v. Joost*, 13 Cal. 620.

Colorado.—*Epley v. Scherer*, 5 Colo. 536; *Jensen v. Brown*, 2 Colo. 694.

Florida.—*Carter v. Brady*, 51 Fla. 404, 41 So. 539.

Illinois.—*Douglas v. McCord*, 12 Ill. App. 278.

New York.—*Cheney v. Troy Hospital Assn.*, 65 N. Y. 282; *Riggs v. Chapin*, 7 N. Y. Supp. 765, 27 N. Y. St. 268; *Hitchings v. Teague*, 113 App. Div. (N. Y.) 670, 99 N. Y. Supp. 967.

Ohio.—*Dunn v. Rankin*, 27 Ohio St. 132.

Virginia.—*Schrieber v. Citizens' Bank*, 99 Va. 257, 38 S. E. 134, 3 Va. Supp. Ct. Rep. 185.

¹¹*Davis v. Livingston*, 29 Cal. 283.

¹²*Chicago Lumber Co. v. Allen*, 52 Kan. 795, 35 Pac. 781; *Clough v. McDonald*, 18 Kan. 114.

¹³*Smith v. Wilcox*, 44 Ore. 323, 74 Pac. 708, 75 Pac. 710. Under a statute which provided that when notice is given, the owner shall be liable for "the amount of such claim" it was held that, when the

§ 128. **Amount subject to subcontractor's claim.**—As a general rule, the lien attaches to installments then due or that thereafter may become due.¹ Of course it can be enforced only after the installment is due.² The failure of the principal contractor will not as a general rule defeat in toto the claim of the subcontractor,³ but the subcontractor will be entitled to so much as his work and materials are reasonably worth, according to the contract price, first deducting all payments rightfully made and damages attaching, occasioned by the non-performance of the principal contract.⁴ In case of non-performance by the principal contractor, the amount covered is the amount fixed by the contract, less damages sustained by non-performance.⁵ As a matter of course, if the damage exceeds the entire amount due on the principal contract, the subcontractor's claim fails,⁶ and this rule will apply even if the damages were liquidated,⁷ or stipulated.⁸ If there is fraud between

notice was given, the owner was liable, not to the extent that he was indebted to the principal contractor, but to the extent of the claim of the sub-contractor. *Shenandoah Val. R. Co. v. Miller*, 80 Va. 821.

¹*Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157. See Dec. & Am. Dig. tit Mechanics' Liens § 164.

²*Heckmann v. Pinkney*, 81 N. Y. 211.

³See § 64. They would pro rate. *Central Lumber Co. v. Braddock Land, Etc., Co.*, 84 Ark. 560, 105 S. W. 583.

⁴*Mehrle v. Dunne*, 75 Ill. 239; *Morehouse v. Moulding*, 74 Ill. 322; *Van Cleaf v. Van Vechten*, 48 Hun (N. Y.) 304, 1 N. Y. Supp. 99; *Wright v. Pohls*, 83 Wis. 560, 53 N. W. 848. *Lake v. Brannin*, 90 Miss 737, 44 So. 65. *Kotcher v. Perrin*, 149 Mich. 690, 113 N. W. 284, 14 Det. Leg. N. 593. In some

cases, it is held, that the work is not to be limited by the contract price, but as to its worth. *Taylor v. Murphy*, 148 Pa. St. 337, 23 Atl. 1134, 30 W. N. C. (Pa.) 27, 33 Am. St. 825.

⁵*Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Waterbury Lumber etc., Co. v. Coogan*, 73 Conn. 519, 48 Atl. 204.

⁶*Parrish v. Christopher* (Ky.), 3 S. W. 603, 8 Ky. L. 868 (without opinion).

⁷*Julin v. Ristow Pothe Mfg. Co.*, 54 Ill. App. 460. When contract states that a certain sum shall be liquidated damages if not complete, owner can retain such sum even as against subcontractors. *McBean v. Kinnear*, 23 Ont. 313.

⁸*California*.—*Wood v. Oakland, etc., Rapid Transit Co.*, 107 Cal. 500, 40 Pac. 806; *Dunlop v. Ken-*

the owner and contractor, this will vitiate everything, but it is not presumed.⁹ However, if it is shown, the guilty parties will not be permitted to benefit thereby; therefore, if a contract were purposely made too low, the subcontractor will not be limited in his claim to such contract price, but for reasonable value of his work done.¹⁰ Where a statute requires the contractor to give a statement of all claims due for labor or materials to the owner, and the owner pays the contractor without demanding such statement, this will be an unlawful act on the part of the owner and he would be liable to the subcontractor in an amount not exceeding the principal contract price.¹¹ The owner has a right to make payments as a general rule, in the manner provided for in his contract, and if the payments are of a kind inconsistent with a lien, the subcontractor may lose his statutory lien, but no doubt a court of equity would follow the property and decree a lien upon that which was the consideration of the contract.¹² As a general rule,

nedy, 102 Cal. 443, 36 Pac. 765; Giant Powder Co. v. San Diego Flume Co., 97 Cal. 263, 32 Pac. 172; Davies-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Kellogg v. Howes, 51 Cal. 170, 22 Pac. 509, 6 L. R. A. 588n.

New York.—Morgan v. Stevers, 6 Abb. N. Cas. (N. Y.) 356.

Under the statute of California, the contract must be in writing and recorded, if it exceed \$1,000, and if it is not so recorded, all the work shall be considered to be performed at the instance of the owner. In such cases where the contract is not recorded, the sub-contractor is not limited to the amount due the contractor. Stimson Mill Co. v. Riley (Cal.), 42 Pac. 1072.

⁹Foster v. Swaback, 58 Ill. App. 581.

¹⁰Foster v. Swaback, 58 Ill. App. 581.

¹¹Conklin v. Plant, 34 Ill. App. 264.

¹²Jones, etc., Lumber Co. v. Murphy, 64 Iowa 165, 19 N. W. 898; Gates v. Whitcomb, 4 Hun (N. Y.) 137, 6 Th. & C. (N. Y.) 341. **Contract to Build and Buy.**—Where the owner contracts to sell and advances money to build, and the deed is not to pass until after the house is completed, when a mortgage is to be given for the purchase price and money advanced, in such cases, the lien of the mechanic would be prior to the mortgage, and the building would be considered as being erected by consent of the owner

a subcontractor's lien will not extend to moneys in the owner's hands, due the contractor for damages sustained by him for the wrongful acts of the owner,¹³ even if the damages are agreed or stipulated.¹⁴ The rule as to extras, especially if made a part of the original contract, is different.¹⁵ However if the statute makes a contractor the owner's agent then the owner is liable to the subcontractor, even though he owe the contractor nothing.¹⁶ As a general rule, the subcontractor's claim is limited to the amount agreed upon in his contract with the principal contractor.¹⁷

§ 129. Amount and extent of lien as to time of commencement.—In determining the amount and extent of the lien it may be said that if the statute mentions no particular time, the amount or extent to which the property may be held, begins at the time the work is commenced or the material furnished,¹ assuming that all conditions precedent have been prop-

under the New York statute. *Schmalz v. Mead*, 125 N. Y. 188, 26 N. E. 251.

¹³*Hoyt v. Miner*, 7 Hill (N. Y.) 525.

¹⁴*Nolan v. Gardner*, 4 E. D. Smith (N. Y.) 727.

¹⁵*Blakeslee v. Fisher*, 66 Hun (N. Y.) 261, 21 N. Y. Supp. 217. *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356. Profit not included. *O'Reilly v. Mahoney*, 123 App. Div. (N. Y.) 275, 108 N. Y. Supp. 53.

¹⁶*Hobbs v. Spiegelberg*, 3 N. Mex. 357, 5 Pac. 529.

¹⁷*Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283, 44 Am. St. 391; *Vogel v. Whitmore*, 72 Hun (N. Y.) 417, 25 N. Y. Supp. 202; *Dore v. Sellers*, 27 Cal. 588. Persons furnishing materials, and performing labor in the construction

of a building are entitled to be paid in full, where the contract price is sufficient. *Central Lumber Co. v. Braddock Land, &c., Co.*, 84 Ark. 560, 105 S. W. 583.

¹*Arkansas*.—*White v. Chaffin*, 32 Ark. 59; *McCullough v. Caldwell*, 8 Ark. 231.

Ohio.—*Choteau v. Thompson*, 2 Ohio St. 114.

Pennsylvania.—*Wrigley v. Mahaffey*, 5 Pa. Dist. 389.

Rhode Island.—*Hawkins v. Boyden*, 25 R. I. 181, 55 Atl. 324. However, if a judgment was taken and no time therein specified, it would date from the time judgment was docketed. *Kendall v. McFarland*, 4 Ore. 292; *Sanford v. Kunkel*, 30 Utah 379, 85 Pac. 363, judgment modified on rehearing, 85 Pac. 1012. See Dec. &

erly performed.² Under some statutes it has been held that the lien claim will extend back to the time that the contract was made,³ or when the contract is recorded.⁴ But the construction given generally to statutes is that the lien does not extend to a time prior to the time when the work was commenced or the materials furnished.⁵ As a matter of course this must depend largely upon the statutory provision relating thereto, and the construction of the same by the courts of the particular jurisdiction.⁶ The general rule is that the

Am. Dig. tit Mechanics' Liens § 165.

²To be prior the record must also show it to come within the mechanic's lien law. *Rosenthal v. Maryland Brick Co.*, 61 Md. 590.

³*Ivey v. White*, 50 Miss. 142; *Bell v. Cooper*, 26 Miss. 650. Under Ky. St. 2467, providing that, if the labor performed or materials furnished shall not be performed or furnished by contract with the owner, but for a contractor or sub-contractor, no lien shall attach for the same "unless notice in writing be given to the owner that a lien will be claimed," the lien, if notice be given within 60 days, relates back, as expressly provided as to the lien of the principal contractor, and takes precedence of intervening liens. *Finck, etc., Lumber Co. v. Mehler*, 102 Ky. 111, 43 S. W. 403, 766.

Where Parties had Knowledge.—Land was purchased by one who agreed to make improvements, and for the purchaser's convenience a deed was executed to a third person, and made an escrow. The grantee and the

purchaser were partners, under an agreement whereby the purchaser was to superintend the erection of buildings on the land, and the grantee was to pay all bills therefor. This was done, and the price was paid by the grantee and the deed delivered. As against a trust deed executed by the grantee, when his deed was delivered to him, mechanic's liens arising in favor of the builders attached as of the date of their contract. *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989; *Hughes v. McCasland*, 122 Ill. App. 365. See § 45 Indiana statute.

⁴*Homans v. Coombe*, 3 Cranch (C. C.) 365, 12 Fed. Cas. 6654. General registry act does not apply. *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850.

⁵*Williams v. Chapman*, 17 Ill. 423, 65 Am. Dec. 669; *McLagen v. Brown*, 11 Ill. 519; *Freeman v. Arnold*, 39 Ill. App. 216; *Northwestern Loan & Inv. Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

⁶See §§ 95-97, as to what constitutes beginning work.

claim cannot antedate the commencement of the building for which the materials were furnished,⁷ though some statutes have been construed to allow the claim to relate back to the time of the furnishing.⁸ The rule where materials and work are put upon property independent of the main improvement, is that the lien dates from the time the materials were furnished or the work commenced.⁹ The mere fact that the land

California.—*McCrea v. Craig*, 23 Cal. 522.

Colorado.—*Keystone Mfg. Co. v. Gallagher*, 5 Colo. 23; *Mellor v. Valentine*, 3 Colo. 255.

Iowa.—*Nellson v. Iowa Eastern R. Co.*, 44 Iowa 71; *Shields v. Keys*, 24 Iowa 298; *Jones v. Swan*, 21 Iowa 181; *Monroe v. West*, 12 Iowa 119, 79 Am. Dec. 524.

Kentucky.—*Caldwell Institute v. Young*, 63 Ky. 582; *Waddy Blue Grass Creamery Co. v. Davis-Rankin Bldg. & Mfg. Co.*, 103 Ky. 579, 45 S. W. 895, 20 Ky. L. 259.

Missouri.—*Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

Nebraska.—*Henry & Coatsworth Co. v. Fisher*, 37 Neb. 207, 55 N. W. 643.

Ohio.—*Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544; *Woodman v. Richardson*, 1 Ohio C. C. 191, 1 Ohio Cir. Dec. 104.

Oregon.—*Henry v. Hand*, 36 Ore. 492, 59 Pac. 330; *Kendall v. McFarland*, 4 Ore. 292.

Pennsylvania.—*Reilly v. Elliott*, 1 Del. Co. Ct. (Pa.) 77.

Utah.—*Teahan v. Nelson*, 6 Utah 363, 23 Pac. 764.

Federal.—*Sabin v. Connor*, 21 Fed. Cas. 12,197; *In re Cook*, 3 Biss. (U. S.) 116, 6 Fed. Cas. 3151.

Work by Month.—The mere fact that one performing lienable work under an entire contract is paid by the month, does not prevent his lien from attaching from the date of the last work. *Nason v. Northwestern Milling & Power Co.*, 17 Wash. 142, 49 Pac. 235; *Knox v. Starks*, 4 Minn. 20; *Farmers' Bank v. Winslow*, 3 Minn. 86, 74 Am. Dec. 740.

Meaning of Furnish.—Under the mechanic's lien law providing that a statement, when filed, shall operate to continue the lien from the time of "furnishing" the first item of labor, the term "furnish" means furnished on the premises, and a lien attaches at the date of the performance of the first work, or the delivery of the first material on the ground; that is, from the commencement of the improvement on the land. *Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543.

⁷*Kansas Mortg. Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153.

⁸*Flint, etc., Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 455, 38 Pac. 566; *Nason v. Northwestern Milling & Power Co.*, 17 Wash. 142, 49 Pac. 235.

⁹*Wells v. Canton Co.*, 3 Md. 234.

changes owners, after the work begins, will not affect the amount of the lien, nor the time when it begins to run.¹⁰ According to some courts where the plans are so changed as to practically make a different contract, the lien for materials furnished thereafter dates from the time the alterations were commenced.¹¹ If the contractor abandons the work, and it is finished by the owner, the lien for the material furnished the owner will date from the commencement of his work.¹² An interruption for a short time followed by a resumption of the work, with no material change in design, will not be considered a recommencement.¹³ And where there is no intention to abandon work, the interruption may, for good cause, extend over several months.¹⁴ But if it is abandoned, or appears to be fully performed, and a new contract made, a lien therefor cannot date from the original commencement.¹⁵

§ 130. Amount and extent—commencement of work.—

Some difficulty may sometimes be experienced in determining as to what will constitute a commencement of the work. This is generally the first labor that is performed on the proposed

¹⁰Gordon v. Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273; Pen-nock v. Hoover, 5 Rawle (Pa.) 291.

¹¹Smedley v. Conaway, 5 Clark (Pa.) 417; Norris's Appeal, 30 Pa. St. 122.

¹²Felke v. C. & E. Railway Co., 14 Ohio C. C. 186. An architect may have his lien, if the building is commenced according to his plans although abandoned with only a part of the excavating done, and no use is thereafter made of the plans. Fitzgerald v. Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. 824.

¹³Gordon v. Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273.

¹⁴Unsuitable season. Manhattan Life Ins. Co. v. Paulson, 1 Stew. (N. J. Eq.) 304. By state of work. Savoy v. Dudley, 168 Mass. 538, 47 N. E. 424.

¹⁵Appeal of Kelley (Pa.), 2 Atl. 868. While there must be some visible commencement of work under the lien statute to fix the time of the commencement of the lien claim, there need not be visible continuity of work from first to last in order that the last labor or material furnished may relate back to the commencement of work, and all be regarded as furnished under one contract or an entire running account. Hutchins v. Bautch, 123

structure. Usually this is the excavation for the cellar.¹ As a general rule it may be said that a commencement in this sense is something which is apparent and such that a person viewing the premises will readily recognize as the beginning of a structure.² If the owner is to do one part and a contractor another part the lien as to each will date from the time each began work on

Wis. 394, 101 N. W. 671, 107 Am. St. 1014.

¹ *Nixon v. Cydon Lodge No. 5*, 56 Kan. 298, 43 Pac. 236; *Thomas v. Mowers*, 27 Kan. 265; *Jacobus v. Mutual Ben. Life Ins. Co.*, 12 C. E. Green (N. J. Eq.) 604; *Mutual Ben. Life Ins. Co. v. Rowand*, 11 C. E. Green (N. J. Eq.) 389.

Commencement.—"It was held by this court, in the case of *Thomas v. Mowers*, 27 Kan. 265, that the work of digging the cellar was the commencement of the building. This case cites *Pennock v. Hoover*, 5 Rawle (Pa.) 291, wherein it is stated: 'The commencement of the building is the first labor done on the ground which is made the foundation of the building and to form part of the work suitable and necessary for its construction. The commencement of a building, in law, takes place with the digging and walling of the cellar.' The case of *Brooks v. Lester*, 36 Md. 65, is also cited, and the case holds: 'It is some work or labor on the ground, such as digging the foundation, which everyone can readily see and recognize as the commencement of the building.' In the case of *Kelly v. Rosenstock*, 45 Md. 389, it was held that where

the lessee, before he had acquired an interest in the property, and before a survey had been made, went, with his foreman and a laborer, and drove stakes to indicate the line of the foundations, and at one corner had dug or scraped away the dirt down to a level, the whole work occupying but a part of a day, that this could not be considered as the commencement of a building. In the case of *Middletown Savings Bank v. Fellowes*, 42 Conn. 36, it is held that bringing a considerable amount of lumber upon the premises, and beginning to build a fence around the lot, does not create a lien prior to a mortgage executed after the delivery of the lumber or the commencement of the fence, the work on the house not commencing until after the execution of the mortgage. In the case of the *Mutual Ben. Life Ins. Co. v. Rowand*, 26 (N. J. Eq.) 389, it is stated: 'The legislature intended to make the actual and visible commencement of the building notice to all who might propose either to purchase or acquire lens on the property.' *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153.

² *Brooks v. Lester*, 36 Md. 65.

his part; but if the statute made the lien run from the "commencement of the building" it will relate back to that time,³ especially if the different kinds of work constitute but parts of one general whole.⁴ The staking of a plan,⁵ the clearing of the ground of stumps,⁶ and the filling up of a lot without an intention of building, have each been held not the commencement of a building thereafter put thereon.⁷ Where the delivery of the materials fixes the time for the beginning of the lien, it will run from the time they are actually furnished for the work,⁸ at a building where required.⁹ Under some statutes it has been held, however, that the lien commences when the materials are ready for delivery at the agreed place.¹⁰ If there are several deliveries constituting a part of one continuous

³ *National Mortgage & Deben-
ture Co. v. Hutchinson Mfg. Co.*,
6 Kan. App. 673, 50 Pac. 100.

⁴ *Parrish's Appeal*, 83 Pa. St.
111.

⁵ *Kelly v. Rosenstock*, 45 Md.
339; *Hagenman v. Fink*, 19 Pa.
Co. Ct. 660.

⁶ *Central Trust Co. v. Cameron
Iron & Coal Co.*, 47 Fed. 136.

⁷ *Klene v. Hodge*, 90 Iowa, 212,
57 N. W. 717; *Jean v. Wilson*, 38
Md. 288. If the building is com-
menced, and then abandoned, and
all bills paid up, and then recom-
menced, the time dates from the
recommencement. *In re Smith's
Estate*, 7 Leg. Gaz. (Pa.) 31.

⁸ *California*.—*McCrea v. Craig*,
23 Cal. 522.

Colorado.—*Mellor v. Valentine*,
3 Colo. 255.

Indiana.—*Fleming v. Bumgar-
ner*, 29 Ind. 424.

Iowa.—*Jones, &c., Lumber Co.
v. Murphy*, 64 Iowa 165, 19 N. W.
898.

Kentucky.—*Finck, &c., Lumber
Co. v. Mehler*, 102 Ky. 111, 43
S. W. 403, 766.

New Hampshire.—*Graton, &c.,
Mfg. Co. v. Woodworth-Mason Co.*,
69 N. H. 177, 38 Atl. 790.

Pennsylvania.—*Keller v. Den-
mead*, 68 Pa. St. 449.

Wisconsin.—*Crocker v. Currier*,
65 Wis. 662, 27 N. W. 825.

⁹ *Treusch v. Shryock*, 51 Md.
162; *Bristol-Goodson Electric
Light &c., Co. v. Bristol Gas,
Electric Light, &c., Co.*, 99 Tenn.
371, 42 S. W. 19; *Huttig Bros.
Mfg. Co. v. Denny Hotel Co.*, 6
Wash. 122, 32 Pac. 1073.

¹⁰ "The question is, whether or
not the word 'furnished,' as used
in the statute, means 'delivered
at the building' in the construc-
tion of which materials are fur-
nished. We think that such is
not its reasonable construction.
The material man is properly said
to have 'furnished' the materials,
when he has delivered, or has

transaction, then the lien will commence with the first delivery.¹¹ But if each delivery is made under a distinct contract the lien for each will date from the time of its own delivery.¹² Where the statute makes the lien date from the filing of the claim, then open and visible work,¹³ or delivery of the materials, will not dispense with the statutory requirements as to time when the lien attaches.¹⁴ In the absence of statutory provision the lien will not relate back prior to the time when the work was done or the materials furnished.¹⁵ But where the lien does relate back, neither change of owner-

them ready for delivery, at the place where he has agreed to deliver them under the contract; which, in this case was at the plaintiff's foundry, some distance from the quartz mill. This point, therefore, is not tenable." *Tibbetts v. Moore*, 23 Cal. 208.

¹¹ *Fields v. Daisy Gold Min. Co.*, 25 Utah 76, 69 Pac. 528. See § 98.

¹² *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

¹³ *Cotton v. Holden*, 1 MacA. (D. C.) 463.

¹⁴ *Indiana*.—*Millikin v. Armstrong*, 17 Ind. 456; *Green v. Green*, 16 Ind. 253, 79 Am. Dec. 428.

Louisiana.—*Marmillon v. Archinard*, 24 La. Ann. 610. A subcontractor's or material man's lien attaches to all money due from the owner to the contractor at the time of filing, or becoming due within 10 days thereafter. *Saginaw Bay Co. v. Engel*, 10 Ohio Cir. Dec. 234.

Oregon.—*Ritchey v. Risley*, 3 Ore. 184.

Pennsylvania.—*Reilly v. Elliott*, 1 Del. Co. Ct. (Pa.) 77.

Utah.—*Elwell v. Morrow*, 23 Utah 278, 78 Pac. 605.

¹⁵ *Arkansas*.—*White v. Chaffin*, 32 Ark. 59.

California.—*Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Barber v. Reynolds*, 44 Cal. 519.

Minnesota.—*Cogel v. Mickow*, 11 Minn. 475.

Missouri.—*Viti v. Dixon*, 12 Mo. 479.

North Carolina.—*Lookout Lumber Co. v. Mansion Hotel, &c., R. Co.*, 109 N. Car. 658, 14 S. E. 35; *Burr v. Maulsby*, 99 N. Car. 263, 6 S. E. 108, 6 Am. St. 517.

Ohio.—*Choteau v. Thompson*, 2 Ohio St. 114; *Williams v. Miller*, 2 Ohio Dec. (Re.) 119.

Utah.—*Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008.

Federal.—*Courtney v. Insurance Co.*, 49 Fed. 309, 1 C. C. A. 249, 4 U. S. App. 140; *In re Hoyt*, 3 Biss. (U. S.) 436, 12 Fed. Cas. 6805. Relates back. *Allen v. Sales*, 56 Mo. 28.

ship,¹⁶ nor the fact that materials have not yet been delivered, will change the rule.¹⁷

§ 131. **Amount and extent—duration of lien.**—When the lien once attaches, it remains until removed in the manner provided by the statute, under which it is taken and can live no longer.¹ The claimant may have a subsisting lien previous to the filing of his statement where the statute permits a certain length of time for filing the statement. The lien becomes fixed when the statement is filed.² The destruction of

¹⁶ *McNeal Pipe & Foundry Co. v. Howland*, 111 N. Car. 615, 16 S. E. 857, 20 L. R. A. 743.

¹⁷ *Keating Implement Co. v. Marshall Electric Light, &c., Co.*, 74 Tex. 605, 12 S. W. 489. Under the lien law, the lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time. *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479.

¹ **Florida.**—*Eddins v. Tweddle*, 35 Fla. 107, 17 So. 66.

Illinois.—*Baxter v. Hutchings*, 49 Ill. 116.

New York.—*Welch v. New York*, 19 Abb. Pr. (N. Y.) 132.

Pennsylvania.—*Garbian v. McGee*, 7 Pa. Co. Ct. 498; *Knorr v. Elliott*, 5 Serg. & R. (Pa.) 49. Act June 17, 1887, provides that a debt for materials or labor furnished for the erection of a building shall be a lien for 30 days

after the last work shall be done, though no claim shall have been filed therefor, and no longer. "The last work done" refers to the work of the claimant and not to the completion of the building. *Egolf v. Casselberry*, 14 Pa. Co. Ct. 87. See Dec. & Am. Dig. tit. Mechanic's Liens, § 174.

² *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. In computing the year within which a mechanic's lien expires the day of filing the notice should be excluded. *Haden v. Buddensiek*, 6 Daly (N. Y.) 3; *Bird v. Skirk*, 6 Leg. Gaz. (Pa.) 149, 2 Leg. Chron. (Pa.) 158. Under the Nebraska law which gives to a subcontractor 60 days from the last day of the month in which the labor was done, or materials furnished to file his claim therefor, and declares that the lien shall continue for two years (Consol. St. Neb. 1891, §§ 2170, 2171), the lien of such a contractor continues, not for two years from the expiration of the 60 days, but only for two years from the time when the last act was done in the performance of the contract, where-

the building will not extinguish the lien.³ As a general rule, the commencement of proceedings to enforce the lien will continue it, until the property is sold and the proceeds applied in its payment.⁴ Under some earlier statutes, a judgment did not continue the lien unless by a special order of the court.⁵ The fact that the judgment is reversed on appeal, will not remove the lien unless the suit is abandoned.⁶ But the right to the lien cannot be extended so as to bind or exclude the rights of other interested parties in the property unless such other parties are properly made parties to the suit.⁷ If the lien has been discharged by the giving of a bond, the bringing of the suit will not keep it alive.⁸ Unreasonable neglect in prosecuting the lien after it has been commenced, may defeat it,⁹

by the lien first becomes determined in amount, so as to be complete and actionable. *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

³ *Cain v. Texas Bldg. & Loan Assn.*, 21 Tex. Civ. App. 61, 51 S. W. 879.

⁴ *New York*.—*Fitzpatrick v. Boylan*, 57 N. Y. 433; *Grant v. Vandercook*, 57 Barb. (N. Y.) 165; *McAllister v. Case*, 15 Daly (N. Y.) 299, 5 N. Y. Supp. 918; *Paine v. Bonney*, 4 E. D. Smith (N. Y.) 734; *In re Gabler*, 57 Misc. (N. Y.) 148, 107 N. Y. Supp. 542.

Pennsylvania.—*People v. Lamb*, 3 Lans. (N. Y.) 134. Where a mechanic's lien has been kept in force, beyond the two years for which it remains operative, by the commencement within the two years of a suit on the claim, the premises charged with the lien may be subjected to the satisfaction of the lien, as against

a purchaser in good faith who bought without actual notice of the plaintiffs claim pending the action thereon, and after the expiration of the two years. *Ambrose v. Woodmansee*, 27 Ohio St. 147.

⁵ *Freeman v. Cram*, 3 N. Y. 305; *Mathews v. Daley*, 7 Abb. Pr. (N.S.) (N. Y.) 379; *Schaettler v. Gardiner*, 4 Daly (N. Y.) 56; *Stone v. Smith*, 3 Daly (N. Y.) 213; *Barton v. Herman*, 3 Daly (N. Y.) 320, 8 Abb. Pr. (N. S.) (N. Y.) 399.

⁶ *Fox v. Kidd*, 77 N. Y. 489; *Hoag v. Hillemeier*, 1 N. Y. St. 549.

⁷ *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386; *Danziger v. Simonson*, 116 N. Y. 329, 22 N. E. 570.

⁸ *Sheffield v. Robinson*, 73 Hun (N. Y.) 173, 25 N. Y. Supp. 1098.

⁹ *Ward v. Patterson*, 46 Pa. St. 372; *Sweeny v. McGittigan*, 20 Pa. St. 319; *Cornellus v. Uhler*, 2 Browne (Pa.) 229.

but not so, it is thought, if the defendant is in court and does not insist on speedy action.¹⁰ If the statute prescribes a method for continuing the lien this must be followed.¹¹ If the right to the lien has expired it cannot be revived by new work,¹² whether made under a new contract or any contract.¹³ Neither can the owner revive the lien,¹⁴ nor can it be continued by a nunc pro tunc entry.¹⁵ What the statute requires to be done to continue a lien, must be done within the time provided by statute or the right is lost.¹⁶ But the debt may survive, though the lien is lost.¹⁷

§ 132. **Property reached by lien.**—In a previous section,¹ consideration was given to the property subject to the lien. We are now to consider what is actually made subject to the lien and it will be well to remember that since the lien has for its purpose the insurance of payment for material and work that has enhanced the value of certain property, it is essential, therefore, to a valid lien that the work or material should have been actually put on the property and that the material should have lost its identity. The lien attaches to the property as a

¹⁰ *Brown v. Jacobi*, 10 Heisk. (Tenn.) 335.

¹¹ *Barton v. Herman*, 3 Daly (N. Y.) 320, 8 Abb. Pr. (N. S.) (N. Y.) 399; *Hood v. Norton*, 202 Pa. 114, 51 Atl. 748; *In re Gould Coupler Co.*, 79 Hun (N. Y.) 206, 29 N. Y. Supp. 622; *Darrow v. Morgan*, 65 N. Y. 333; *McGuckin v. Coulter*, 1 Jones & S. (33 N. Y. Super.) 324, 10 Abb. Pr. (N. S.) (N. Y.) 128.

¹² *Farnham v. Davis*, 79 Me. 282, 9 Atl. 725. See §§ 97, 98.

¹³ *Darrington v. Moore*, 88 Me. 569, 34 Atl. 419.

¹⁴ *Jones v. Alexander*, 10 Sm. & M. (Miss.) 627; *Lyon v. Elser*, 72 Tex. 304, 12 S. W. 177.

¹⁵ *Dart v. Fitch*, 23 Hun (N. Y.) 361; *Poerschke v. Kedenburg*, 6 Abb. Pr. (N. S.) (N. Y.) 172.

¹⁶ *Blocher v. Worthington*, 10 Md. 1. A refileing before the expiration of the first year continues the lien indefinitely until the order of continuance is vacated, or the lien is disposed of in one of the other ways provided by the statute. *Bigelow v. Bailey*, 59 Hun (N. Y.) 403, 13 N. Y. Supp. 362, 36 N. Y. St. 636. Where judgment is obtained within the year, no formal order to continue the lien is necessary.

¹⁷ *Hunter v. Lanning*, 76 Pa. St. 25.

¹ See § 10.

whole,^{1a} and therefore no lien will attach to a part of the entirety. Thus a lien on a saw mill building will not reach lumber sawed in the mill;^{1b} nor on any specific articles furnished for the building as separate from the building itself,² and not attached thereto.³ However, the fact that the lien statement is so drawn that it does not cover all that it might, will not seriously affect it, especially as to the owner.⁴ Where the statute fixes the extent of land that may be subject to the lien, the parties may by agreement reduce or extend a statutory limit,⁵ but the lien holder cannot claim more than he described in his statement.⁶ As a general rule, the lien is limited to the "lot of land" upon which the improvement is located,⁷ "together," according to some statutes, "with a convenient space or so much as may be required for convenient use and occupation" of the improvement,⁸ or that may be "necessary for the purpose of the building."⁹ And generally the lien upon the building carries with it the right to the lien on the land upon which the building is situated or so much of it as is

^{1a} *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 Pac. 713. See 'Dec. & Am. Dig. tit. Mechanic's Liens, § 180.

^{1b} *Russell v. Painter*, 50 Ark. 244, 7 S. W. 35.

² *Baylies v. Sinex*, 21 Ind. 45.

³ See § 104; *Wagar v. Briscoe*, 38 Mich. 587. Tools used in a manufacturing plant not included. *Haeussler v. Missouri Glass Co.*, 52 Mo. 452. Not for work done on other and separate property. *Findlay v. Roberts*, 19 Ga. 163. That mechanics' liens do not attach to other premises separate and distinct from those upon which the improvement or repair is made, is a rule of law too well settled, to require any citation of authorities to support it. *Lam-*

bert v. Williams, 2 Tex. Civ. App. 413, 21 S. W. 108.

⁴ *Culmer v. Clift*, 14 Utah 286, 47 Pac. 85.

⁵ *Sheffield Furnace Co. v. With-erow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. 936.

⁶ *McDonald v. Lindall*, 3 Rawle (Pa.) 492.

⁷ See § 135.

⁸ *Tunis v. Lakeport Agricultural Park Assn.*, 98 Cal. 285, 33 Pac. 63, 447. Designed means adapted. *Filtson Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228.

⁹ *Nelson v. Campbell*, 28 Pa. St. 156; *Brown v. Peterson*, 2 Woodw. Dec. (Pa.) 112; *Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co.*, — N. Mex. —, 93 Pac. 706.

necessary to the full use and enjoyment of the property.¹⁰ When there are no visible divisions the entire tract is considered as the "lot of land."¹¹ The fact that a small part has a fence around it, will not be a segregation of such part.¹² And this rule will extend to several buildings on the same tract,¹³ if the buildings are all considered as one by the owner.¹⁴ As to what may be included depends largely upon the facts at the time the contract was made.¹⁵ Under some statutes, the court may order a part sold if it does not injure the remainder,¹⁶ or the defendant may so sell.¹⁷ If through the owner's fault, the whole building is not erected, this will not prevent the lien extending to the entire part,¹⁸ but it is error to include more than is legally liable.¹⁹

§ 133. **Extent of tract of land covered by lien.**—If the building is on a larger tract than allowed by law, and the law does

¹⁰ **California.**—Ward v. Crane, 118 Cal. 676, 50 Pac. 839.

Connecticut.—Lindsay v. Gunning, 59 Conn. 296, 22 Atl. 310; 11 L. R. A. 553.

New Jersey.—Edwards v. Derickson, 4 Dutch N. J. L. 39; Vandyne v. Vanness, 1 Halst. Ch. (N. J. Eq.) 485.

New Mexico.—Mountain Electric Co. v. Miles, 9 N. Mex. 512, 56 Pac. 284. What is necessary questions for the jury in some instances. Keppell v. Jackson, 3 Watts & S. (Pa.) 320; Dean v. Pyncheon, 3 Chand. (Wis.) 9, 3 Pinn. (Wis.) 17.

¹¹ St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546; Orr v. Fuller, 172 Mass. 597, 52 N. E. 1091.

¹² Broyhill v. Gaither, 119 N. Car. 443, 26 S. E. 31.

¹³ Small v. Foley, 8 Colo. App. 435, 47 Pac. 64.

¹⁴ Pennock v. Hoover, 5 Rawle (Pa.) 291.

¹⁵ Le Forgee v. Colby, 69 Ill. App. 443; Badger Lumber Co. v. Malone, 8 Kan. App. 121, 54 Pac. 692; Baker v. Waldron, 92 Me. 17, 42 Atl. 225, 69 Am. St. 483; Collins v. Patch, 156 Mass. 317, 31 N. E. 295.

¹⁶ North Presbyterian Church v. Jevne, 32 Ill. 214, 83 Am. Dec. 261; Springer Land Assn. v. Ford, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. 170.

¹⁷ Broyhill v. Gaither, 119 N. Car. 443, 26 S. E. 31.

¹⁸ Hill v. La Crosse, &c., R. Co., 11 Wis. 214.

¹⁹ A burial ground is not subject to a lien. Beam v. Methodist Episcopal Church, 3 Clark (Pa.) 343.

not state who shall define the boundaries, the claimant may do so,¹ or the court may do so, to the best interests of all concerned.² It is error to decree the sale of more than is permitted by law.³ Unless the land forms some part, either as an appurtenant or otherwise,⁴ of the land upon which the building is located, it cannot be used to satisfy a lien or claim for work or materials furnished for the building.⁵ Where the statute gives the lien on a "lot of land" this does not mean a lot that is platted or a town plat, but what is used and considered by the owner as one lot or tract.⁶ But in the absence of proof to the contrary it will not be considered less than would be included in a city lot where the same is so platted.⁷ As between the owner and contractor, it is error to take a lien on less than the law allows, but if such action results in prejudice to others, it will not be permitted.⁸ In other words if no one is prejudiced, so much may be taken as may be reasonably convenient for the use of the building.⁹

§ 134. Extent of tract of land covered by lien (continued).—
Where the buildings are upon farms the lien, as a general rule, will

¹ *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205. See Dec. & Am. Dig. tit. Mechanics' Liens, § 181.

² *Hill v. La Crosse, &c., R. Co.*, 11 Wis. 214.

³ *White v. Chaffin*, 32 Ark. 59; *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942; *Engleman v. Graves*, 47 Mo. 348.

⁴ See § 138.

⁵ *Illinois*.—*Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Woodburn v. Gifford*, 66 Ill. 285; *Seller v. Schaefer*, 40 Ill. App. 74; *Stout v. Sower*, 22 Ill. App. 65; *Van*

Lone v. Whittemore, 19 Ill. App. 447.

New Mexico.—*Ford v. Springer Land Assn.*, 8 N. Mex. 37, 41 Pac. 541.

⁶ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Holland v. McCarty*, 24 Mo. App. 82; *Choteau v. Thompson*, 2 Ohio St. 114; *Hill v. La Crosse, &c., R. Co.*, 11 Wis. 214.

⁷ *Pairo v. Bethell*, 75 Va. 825.

⁸ *Whalen v. Collins*, 164 Mass. 146, 41 N. E. 124.

⁹ *Bank v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325.

include the entire tract that is used as one farm.¹⁰ A statute which allows the lien on land on which the building is situated together with so much of the land about it as may be required for convenient use and occupation, does not contemplate a larger tract than that indicated. In one case it was held that it would not cover a forty-acre tract.¹¹ As a general rule, each separate lot must bear the burden of the building erected thereon.¹² And while the lien is attached to several buildings on different lots, the lien holder may have his lien satisfied out of any one of the separate lots,¹³ or buildings.¹⁴ But if this interferes with the rights of third persons, then only the buildings and lot upon which the labor was done may be held.¹⁵

¹⁰ *Cowan v. Griffith*, 108 Cal. 224, 41 Pac. 42, 49 Am. St. 82. Plaintiff erected a creamery, silo, barn and cow stable on defendant's farm of 350 acres. The buildings erected were all near to each other, occupying a lot in the interior of the farm. In an action to enforce a builder's lien against the buildings and farm, it was held that such lien extended to the whole of the farm, both as against the owner and his creditors, under a statute which provides that "every building in the construction or repairs of which any person shall have a claim for materials furnished or services rendered shall, with the land on which the same may stand, be subject to the payment of such claim." *Lindsay v. Gunning*, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553; *In re Wismer's Estate*, 2 Pa. Ct. Ct. 387; *Filston Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228.

¹¹ It is not meant that suffi-

cient land about the dwelling to support the owner while living on the land shall be subject to the lien. *Cowan v. Griffith*, 108 Cal. 224, 41 Pac. 42, 49 Am. St. 82. Owner must act if he would have less sold. *Fulton v. Parlett*, 104 Md. 62, 64 Atl. 58.

¹² See § 138.

¹³ *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Livingston v. Miller*, 16 Abb. Pr. (N. Y.) 371; *Stewart v. McQuaide*, 48 Pa. St. 195; *Bradley Co. v. Gaghan*, 208 Pa. 511, 57 Atl. 985.

¹⁴ *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Ore. 527.

¹⁵ **Alabama**.—*Leftwich Lumber Co. v. Florence Mut. Bldg. Loan & Savings Assn.*, 104 Ala. 584, 13 So. 48.

Illinois.—*Culver v. Elwell*, 73 Ill. 536.

Indiana.—*Stephens v. Duffy*, 81 N. E. 1154, 41 Ind. App. 385, 83 N. E. 268.

New York.—*Paine v. Bonney*, 4

§ 135. **Lot of land covered by lien.**—The fact that there is another building on the land, not shown to be separate, will not prevent the lien attaching to all.¹ When joint tenants divide their land and take possession of their several parts, although no deed passes, and one of the parties has a house erected on his part, his part only is liable for the lien.² Where work is done on a building, which is then removed to another tract, and again work is done thereon, it has been held that the lien will extend to both tracts.³ Subcontractors stand in the same position as the principal contractor with reference to obtaining a lien on buildings and land separate from each other.⁴ Generally where it is proper to include both buildings and land in one lien statement⁵ a lien can be enforced on all.⁶ If the lien statement is required to be separate, then that would

E. D. Smith (N. Y.) 734, 6 Abb. Pr. (N. Y.) 99.

Nebraska. — Badger Lumber Co. v. Holmes, 44 Neb. 244, 62 N. W. 446, 48 Am. St. 726. Byrd v. Cochran, 39 Neb. 109, 58 N. W. 127. Where a building was erected upon a tract of land comprising 1,293 acres, embracing a number of separate parcels, each with its own original dwelling and appropriate outbuildings still occupied for farming purposes, with the boundaries and fences between them maintained, the whole tract was not subject to a mechanic's lien. Filston Farm Co. v. Henderson, 106 Md. 335, 67 Atl. 228.

¹ Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57. See Dec. & Am. Dig. tit. Mechanics' Liens, § 183.

² Otis v. Cusack, 43 Barb. (N. Y.) 546.

³ Stelgleman v. McBride, 17 Ill. 300.

⁴ Parties contracting for a

"builders' lien" will be construed to have used the term in its statutory sense, as including the land. June v. Doke, 35 Tex. Civ. App. 240, 80 S. W. 402. Under Virginia Code 1873, c. 115, § 3, which provides that persons "performing labor, or furnishing materials, for the construction, repair, or improvement of any building, or other property, shall have a lien upon such property," a subcontractor who furnishes materials for the construction of two houses erected under a single contract on lots on opposite sides of a street has a joint lien on both houses and lots for the entire amount of materials furnished for both houses. Sergeant v. Denby, 87 Va. 206, 12 S. E. 402.

⁵ See § 85.

⁶ Mahon v. Surerus, 9 N. Dak. 57, 81 N. W. 64; Peck v. Standart, 1 Ill. App. 228; Christian v. Illi-

control as to the enforcement of the lien.⁷ If the lien covers all, and one is released or waived, as between the parties that part must be excepted from the lien.⁸ If several buildings are on the same lot, in order that one lien shall cover all, they must be erected for some general connected use.⁹ And if they are not so, where the rights of third persons intervene, the lien must be apportioned according to the work and materials going into each.¹⁰ As between the parties, even though the contracts are separate, all being on one tract, the entire tract may be applied to payment of the lien.¹¹ This will be true even if the tracts are subdivided, provided the subdivision

nois Malleable Iron Co., 92 Ill. App. 320. Comp. St. Nebraska, 1901, c. 54, art. 1, provides that one who furnishes material for a house to a person in possession of land who is not an owner thereof can have a lien on the buildings. *Shull v. Best*, (Neb.) 93 N. W. 753. Where the structure on which work was performed, though arranged for use as two dwelling houses, was one building, a mechanic's lien may be enforced against the structure as one building for the whole amount due for work done on each house. *Getchell v. Moran*, 124 Mass. 404.

⁷ *Landers v. Dexter*, 106 Mass. 531; *Hays v. Goodman*, 16 Montg. Co. L. Rep'r, 43.

⁸ *Maryland Brick Co. v. Dunkerly*, 85 Md. 199, 36 Atl. 761.

⁹ *Ewing v. Allen*, 99 Iowa 379, 68 N. W. 702; *Fulton v. Parlett*, 104 Md. 62, 65 Atl. 58. A stack constructed in a pork house, essential both for the pork house and a distillery, whether the distillery or not, and though the pork

house may be used independently of the distillery, yet, being erected for and necessary to both establishments must be regarded as a part thereof; and the account for constructing the stack is a lien upon both. *Bodley v. Denmead*, 1 W. Va. 249.

¹⁰ *Taylor v. Montgomery*, 20 Pa. St. 443. Houses separately mortgaged, etc. *Wilcox v. Woodruff*, 61 Conn. 578, 24 Atl. 521, 1056, 29 Am. St. 222, 17 L. R. A. 314n.

¹¹ **California.**—*Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312.

Illinois.—*St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546.

Kansas.—*Mulvane v. Chicago Lumber Co.*, 56 Kan. 675, 44 Pac. 613.

Maryland.—*Okisko Co. v. Matthews*, 3 Md. 168.

Massachusetts.—*Quimby v. Durgin*, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; *Wall v. Robinson*, 115 Mass. 429.

Minnesota.—*Glass v. St. Paul Park Carriage, &c., Co.*, 43 Minn. 228, 45 N. W. 150.

is made after the original contract was entered into.¹² If the work is on separate contiguous lots with no visible line between them, a lien for labor or materials furnished under one contract attaches to all in preference to a mortgage given on one, the mortgage being given after the building contract is entered into.¹³

§ 136. Land covered by lien—several houses on tract.—As a general rule, all of the block of houses on one tract erected under one contract, will be covered by a single lien.¹ In some cases the court, where justice is subserved, may apportion it between the several houses.² As a general rule, it may be said that one lien cannot extend to separate buildings on different lots.³ If the lots are city lots, adjoining or so contiguous as to be considered as one lot of land, and all the erections are made under one contract, then the lien may extend to the

¹² *Fried v. Blanchard*, 58 Ill. App. 622; *Pflueger v. Lewis Foundry, &c., Co.*, 134 Fed. 28, 67 C. C. A. 102. *West Philadelphia Brick Co. v. Johnson*, 3 Pa. Super. Ct. 220, 39 W. N. C. (Pa.) 509.

¹³ *Perkins v. Boyd*, 37 Colo. 265, 86 Pac. 1045; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Batchelder v. Rand*, 117 Mass. 176. Under a statutory provision that the "entire land upon which any such building erection or other improvement is situated, including that portion not covered therewith," shall be subject to a mechanic's lien, where there were separate buildings not erected under one contract, the lien does not extend to all, but only to those for which the materials were furnished and so much of the lot as was properly appurtenant thereto. *Ewing v.*

Allen, 99 Iowa 379, 68 N. W. 702.

¹ *Brabazon v. Allen*, 41 Conn. 361; *Worthley v. Emerson*, 116 Mass. 374; *Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583.

² *Goldheim v. Clark*, 68 Md. 498, 13 Atl. 363; *Fitzpatrick v. Allen*, 80 Pa. St. 292. Held that where three buildings are erected under an entire contract on three lots, one of which is separated from the others, the lien for the labor and materials furnished for all does not extend to each lot. *Guarantee Sav., &c., Co. v. Cash*, 99 Tex. 555, 91 S. W. 781.

³ See § 85; *Landers v. Dexter*, 106 Mass. 531; *Buckely v. Commercial Nat. Bank*, 62 Ill. App. 202; *Fried v. Blanchard*, 58 Ill. App. 622; *Steigleman v. McBride*, 17 Ill. 300. Applies to subcontractors. *Knauff v. Miller*, 45 Minn. 61, 47 N. W. 313.

entire tract.⁴ Where a separate statement or account is kept as to what each building is chargeable with,⁵ one block of houses should not be charged for the expense of all.⁶ But this must not affect the rights of third persons.⁷ The fact that at one time the land upon which the building erected was in two tracts will not prevent it from being considered as one, so far as the lien is concerned,⁸ if treated as such by the owner.⁹ Where a solid block of houses is built over several contiguous lots, one lien will cover all,¹⁰ and even if not solid, if all are

⁴ *Badger Lumber Co. v. Holmes*, 44 Neb. 244, 62 N. W. 446, 48 Am. St. 726; *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 Atl. 297, 35 Am. St. 431, 17 L. R. A. 599; *Doolittle v. Plenz*, 16 Neb. 153, 20 N. W. 116; *Lyon v. Logan*, 68 Tex. 521, 5 S. W. 72, 2 Am. St. 511.

⁵ *Williams v. Judd-Wells Co.*, 91 Iowa 378, 59 N. W. 271, 51 Am. St. 350.

⁶ *Badger Lumber Co. v. Holmes*, 55 Neb. 473, 76 N. W. 174. Where building material has been ordered for the construction of several houses on a certain tract of land, which, before all of the material has been delivered, or a lien filed, is subdivided according to the number of houses, the lien must be apportioned and charged pro rata against the house. *Blanchard v. Fried*, 162 Ill. 462, 44 N. E. 880.

⁷ *Metzger v. McCann*, 92 Ill. App. 109; *Friedlaender v. McCann*, 91 Ill. App. 415.

⁸ Defendant bought one of two adjoining pieces of land, and took a 50-year lease of the other. He erected an exterior fence, inclosing both lots, pulled down the division fence, built a continuous

dock for coal along the entire river front of both lots, and used the whole tract as a coal yard. Held, that a lien under a single contract covered both lots as a single lien. *Marston v. Kenyon*, 44 Conn. 349.

⁹ *Colorado*.—*Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

Michigan.—*Lamont v. La Fevre*, 96 Mich. 175, 55 N. W. 687.

Minnesota.—*Miller v. Shepard*, 50 Minn. 268, 52 N. W. 894; *Wakefield v. Latey*, 39 Neb. 285, 57 N. W. 1002; *Miller v. Schmitt*, 67 N. Y. Supp. 1077. Under a law giving a lien upon a "building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated," such a lien will include several adjoining lots inclosed by a common fence, and used and controlled by the owner of the building for one common and avowed purpose, though as to some he is not the absolute owner. *Ex Parte Davis*, 9 Rich. (S. Car.) 204.

¹⁰ *Berndt v. Armknecht*, 50 Ill. App. 467; *James v. Hambleton*, 42 Ill. 308; *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3.

used as one, the lien will cover all.¹¹ Where separate owners join together in the erection of one or several buildings on contiguous lots, one lien may cover all.¹² A claimant may enforce his lien on each separately where he has kept a separate account.¹³ And it would be proper for the court in the interest of justice, to apportion the amount that each should receive, where several parties are interested.¹⁴

§ 137. Lien on contiguous lots—Ohio statute—Section 3184d of the Ohio statute provides that when the improvement consists of two or more buildings united together, and situated upon the same lot, or contiguous lots, or upon separate buildings upon contiguous lots, and directed under one general contract, it shall not be necessary to file a separate lien upon each building for the work done or material furnished in the erection of such improvements.¹⁵

§ 138. Building, fixtures and appurtenances, covered by lien.—A great majority of states do not recognize a mechanics' lien upon a building or structure erected separate and apart from the land upon which it is located.¹ And if there can be

¹¹ *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737; *Hooven, &c., Co. v. Featherstone*, 111 Fed. 81, 49 C. C. A. 229.

¹² *Meixell v. Griest*, 1 Kan. App. 145, 40 Pac. 1070; *Carpenter v. Leonard*, 5 Minn. 155; *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815; *Fullerton v. Leonard*, 3 S. Dak. 118, 52 N. W. 325.

¹³ *Hannon v. Logan*, 14 Mo. App. 33; *Hayden v. Logan*, 9 Mo. App. 492; *Byrd v. Cochran*, 39 Neb. 109, 58 N. W. 127; *Edwards v. Edwards*, 24 Ohio St. 402.

¹⁴ *Ballou v. Black*, 17 Neb. 389; 23 N. W. 3; *Edwards v. Edwards*,

24 Ohio St. 402. If the contracts are separate, the liens should be separate. *Meek v. Parker*, 63 Ark. 367, 38 S. W. 900, 58 Am. St. 119.

¹⁵ Act Apr. 15; 86 Ohio Laws, 373, 374; *Edwards v. Edwards*, 24 Ohio St. 402. See §§ 135 and 136.

¹ *Iowa*.—See § 10. *Early v. Burt*, 68 Iowa 716, 28 N. W. 35.

Kentucky.—*Fetter v. Wilson*, 12 B. Mon. (Ky.) 90.

Minnesota.—*King v. Smith*, 42 Minn. 286, 44 N. W. 65.

Missouri.—*General Fire Extinguisher Co. v. Schwartz Bros. Com. Co.*, 165 Mo. 171, 65 S. W.

no lien on the land, there is none on the building.² Under the statutes of comparatively few of the states, the lien is given on the building alone and separate from the land upon which it is located.³ And sometimes the lien is upon the building, and the interest that the person erecting the same has in the land, and if he has none in the land, in order that the mechanic shall not lose his claim, it is allowed on the building.⁴ When the work is once done, on one building, the improvement or building loses its identity separate and apart from the land, and all where there are several, become liable to prior liens on the

318; *State v. Halley*, 71 Mo. App. 200.

Pennsylvania.—*In re Olympic Theatre*, 2 Browne (Pa.) 275.

Vermont.—*Roby v. University of Vermont*, 36 Vt. 565, 86 Am. Dec. 675.

Washington.—*Wright v. Cowie*, 5 Wash. 341, 31 Pac. 878; *Kellogg v. Littell, &c., Mfg. Co.*, 1 Wash. St. 407, 25 Pac. 461. See Dec. & Am. Dig. tit. Mechanics' Liens, § 185.

² *Jessup v. Stone*, 13 Wis. 466 [521]; *Rees v. Ludington*, 13 Wis. 308, 80 Am. Dec. 741.

³ *Gaskill v. Davis*, 66 Ga. 665; *Planters' Bank v. Dodson*, 9 Sm. & M. (Miss.) 527; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

⁴ **Iowa.**—*Estabrook v. Riley*, 81 Iowa 479, 46 N. W. 1072, 10 L. R. A. 33n.

Minnesota.—*Carpenter v. Leonard*, 5 Minn. 155.

Mississippi.—*Buchanan v. Smith*, 43 Miss. 90.

Missouri.—*Seidel v. Bloeser*, 77 Mo. App. 172.

Nebraska.—*Pickens v. Plattsmouth Land & Inv. Co.*, 31 Neb. 585, 48 N. W. 473.

New York.—*Ombony v. Jones*, 19 N. Y. 234. Where one in possession rightfully of land, to which he has no title, erects a building thereon, it will be subject to a mechanic's lien for material used in constructing it. *Smith v. St. Paul Fire, &c., Ins. Co.*, 106 Iowa 225, 76 N. W. 676.

Under contract of sale.—Defendant sold a lot upon time payments, giving a bond for a deed, which provided for a forfeiture on default in any of the payments, at the obligor's election, and further, that "under this agreement the interest of the obligee in said premises shall be only a leasehold interest, until deed is made thereunder, and shall not be subject to any mechanic's lien, or other lien by reason of any act of said obligee." The law provided for mechanic's liens on improvements made by a lessee, and declares that such lien shall not be impaired by a forfeiture of the lease for nonpayment of rent, or "non-compliance with any of the other stipulations therein." The purchaser erected a dwelling built on blocks on the premises, and

land.⁵ This is true, so long as the buildings are each considered separate by themselves.⁶ If several buildings are such that separate lien statements may be filed, then each will be subject to its own work or burden.⁷ And when property which is considered as personal property becomes so attached to real estate as to become a fixture of the same, then it is a part of the real estate and is covered by liens upon the building generally.⁸ In some cases the same rule is applied in determining when they are subject to the lien, as in case of sale on execution.¹¹ Motive power in some states is considered part

the lien was filed by the material man, after which a forfeiture was declared, and the seller took possession and sold to another. The lien was good, since the prohibition against a lien was only as to the purchaser's interest in the land, and not as to the improvement thereon. *Oliver v. Davis*, 81 Iowa 287, 46 N. W. 1000.

⁵ *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615. Where a portion of the premises has been absorbed by a prior lien thereon, a material man may have a lien for his entire debt on the remainder of the premises. *Badger Lumber Co. v. Holmes*, 55 Neb. 473, 76 N. W. 174. See priority of lien, §§ 149-164.

⁶ *Title Guarantee, &c., Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454; *Salt Lake Litho. Co. v. Ibex Mine, &c., Co.*, 15 Utah 440, 49 Pac. 768, 62 Am. St. 944.

⁷ *Whitenack v. Noe*, 3 Stockt. (N. J. Eq.) 413.

Separate Buildings on Adjoining lots.—A contract for painting seven buildings showed that the

work on each building ranged from \$544.13 to \$322.76. Four of the lots fronted east, on which were four buildings, joined by partition walls, but not under the same roof. Immediately west of such lots was a private alley and west of it were the other three lots fronting north, with three buildings thereon, joined by partition walls, but not under the same roof; each of the houses and lots must be treated as a separate piece of property, and the contractors were not entitled to a single lien against all. *Buckely v. Commercial Nat. Bank*, 171 Ill. 284, 49 N. E. 617.

⁸ See §§ 10, 11. *Rogers v. C. C. C. Min. Co.*, 75 Mo. App. 114. A mechanic's lien, created by the statute, is not upon the specific thing furnished, nor upon the interest in the land alone of the party for whom furnished, but against the land to be satisfied in any way consistent with the statute and the principles of equity. *Steigleman v. McBride*, 17 Ill. 300.

¹¹ *McGreary v. Osborne*, 9 Cal. 119.

of the real estate, while the machines driven thereby are fixtures.¹² Whether it is a fixture or not is a question of law and fact to be determined on the trial of the case.¹³ As a general rule, it may be said that an appurtenance to a building is not by itself to be subjected to a mechanics' lien.¹⁴

§ 139. Estate or interest in land, covered by lien.—Whatever estate or interest the person making the contract,¹ has in the land upon which the building is to be erected or the im-

¹² *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 492; *Gashe v. Ohio Lumber Co.*, 5 Ohio S. & C. P. Dec. 130, 31 Wkly. L. Bull. (Ohio) 189.

¹³ *Turner v. Wentworth*, 119 Mass. 459; *White's Appeal*, 10 Pa. St. 252. A copper kettle in a brew house. *Gray v. Holdship*, 17 Serg. & R. (Pa.) 413, 17 Am. Dec. 680n. Cars used in connection with a drier in a brickyard upon which bricks are loaded and kept until drying is complete. *Curran v. Smith*, 37 Ill. App. 69. A pump placed in a basement of a building and planted down in the ground and connected to pipes in a waterworks. *Goss v. Helbing*, 77 Cal. 190, 19 Pac. 277. Machinery which is capable of being severed. *Slocum v. Caldwell*, (Ky.) 13 S. W. 1069, 12 Ky. L. 514. Mining machinery placed in the building by a miner. *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1, 31 S. W. 922. Unless so attached that it cannot be removed without great injury to building. *Buchanan v. Cole*, 57 Mo. App. 11. A boiler, pump, engine, and machinery, simply placed at a mining shaft. *Meis-*

trell v. Reach, 56 Mo. App. 243. Store counters. *Baum v. Covert*, 62 Miss. 113. Building erected by tenant with power of removal. *Collins v. Mott*, 45 Mo. 100. Or erected by tenant for purpose of trade. *Church v. Griffith*, 9 Pa. St. 117, 49 Am. Dec. 548. Hoisting engine in coal mine. *Ottumwa Iron Works v. Muir*, 126 Mo. App. 582, 105 S. W. 29.

¹⁴ See § 12; *Carpenter v. Leonard*, 5 Minn. 155.

¹ See §§ 26-31.

Illinois.—*Chicago Smokeless Fuel Gas Co. v. Lyman*, 62 Ill. App. 538.

Mississippi.—*English v. Foote*, 8 S. & M. (Miss.) 444.

Ohio.—*Lord v. Chaffee*, 2 Clev. L. 297, 4 Ohio Dec. (Re.) 514.

Pennsylvania.—*Weaver v. Sheeler*, 118 Pa. St. 634, 12 Atl. 558.

New York.—*Pennsylvania Steel Co. v. Title Guarantee & Trust Co.*, 50 Misc. (N. Y.) 51, 100 N. Y. Supp. 299. A mechanic's lien cannot ordinarily be imposed on a building unless in connection with some estate or interest in the land on which it is erected. *Williamson v. Shank*, 41 Ind. App. 513, 83 N. E. 641.

provements made at the time the materials are furnished,² will be subject to the lien,³ and what may be acquired during the performance of the work.⁴ Unless the statute specifically so provides, the interest of the heir is not liable for a lien acquired under contract of his ancestor.⁵ However, if the lien becomes fastened before the ancestor died, the heir will receive the land with the burden of the lien.⁶ Where a subscription contract for the erection of a building binds the subscribers to pay only their respective amounts, it was held that a lien would attach to the interest of each for the sum due from him.⁷ The mechanic is bound to ascertain the nature of the title held by the person with whom he contracts.⁸ When property that is subject to a lien is transformed into money, a court of equity will consider the money as it would consider the property before sale so far as the rights of lien holders would attach thereto, and in certain cases will follow it in the

² See § 10. See Dec. & Am. Dig. tit. Mechanics' Liens § 107. *Sisson v. Holcomb*, 58 Mich. 634, 26 N. W. 155; *Evans v. Montgomery*, 4 Watts & S. (Pa.) 218; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996.

³ See § 10. *Bray v. Smith*, 87 Iowa 339, 54 N. W. 222; *Shaw v. Young*, 87 Me. 271, 32 Atl. 897; *Savoy v. Jones*, 2 Rawle (Pa.) 343; *Kenny v. Gage*, 33 Vt. 302. A claim can never be enforced against a person's interest, unless the lien makes an assertion against such person's interest.

⁴ *Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47.

⁵ *Tubridy v. Wright*, 7 Misc. (N. Y.) 403, 27 N. Y. Supp. 978. Lien held on trust property where deed recited, improvements might be made. *Taylor v. Gilsdorf*, 74 Ill.

354. Where a mechanic's lien is filed on real estate and improvements a part of which is owned by minors, and the adult defendants have the suit dismissed as to the minors, they are liable to pay the entire debt. *Armijo v. Mountain Electric Co.*, 11 N. Mex. 235, 67 Pac. 726.

⁶ *Hoag v. Hay*, 103 Iowa 291, 72 N. W. 525.

⁷ *Hines v. Chicago Bldg. & Mfg. Co.*, 115 Ala. 637, 22 So. 160.

⁸ *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292. Where a guardian with her ward's money, purchases real estate, which by a deed duly recorded is conveyed to her in trust for her wards, with power to sell, convey, and incumber in her direction, a material man furnishing material in the erection of improvements on the real estate is chargeable with

hands of the vendor.⁹ So rents and profits in the hands of a receiver have been applied to the claim of mechanics.¹⁰ But the lien does not attach to a policy of insurance on the property,¹¹ especially if the policy be assigned before the jurisdiction of the equity court attaches.¹² Sometimes it is held that the right to the lien becomes fixed at the time the contract is made, but this is not the general rule. In no case does the lien, where the parties are free from fraud, affect a pre-existing right of title.¹³ Thus if a party consents to another erecting a building on his land, he will be estopped from denying a lien for the materials furnished to the building.¹⁴

§ 140. Interest or estate of contracting owner, covered by lien.—As a general rule, it may be said that the person making the contract must have some recognized ownership,¹ or there will be no lien, but if there is such an ownership, be it ever so small, that will be covered by the lien.² A co-tenant, unless by the other co-tenant's consent, can bind his interests

notice of the trust; and his right to a mechanic's lien is inferior to the right of the wards to follow their money thus wrongfully invested. *Alfred Richards Brick Co. v. Atkinson*, 16 App. Cas. (D. C.) 462.

⁹*Gaty v. Casey*, 15 Ill. 189; *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46; *Schenley's Appeal*, 70 Pa. St. 98.

¹⁰*Hoover v. Wheeler*, 23 Miss. 314.

¹¹*Cameron v. Fay*, 55 Tex. 58.

¹²*Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. 508.

¹³*Scales v. Griffin*, 2 Doug. (Mich.) 54. See § 144.

¹⁴*Hooker v. McGlone*, 42 Conn. 95.

¹See §§ 25-27. See Dec. & Am. Dig. tit Mechanics' Liens § 188.

²*District of Columbia*.—*Alfred Richards Brick Co. v. Atkinson*, 16 App. Cas. (D. C.) 462.

Illinois.—*Donaldson v. Holmes*, 23 Ill. 85 [83]; *Steigleman v. McBride*, 17 Ill. 300; *Randolph v. Chisholm*, 29 Ill. App. 172.

Kansas.—*Seitz v. Union Pac. R. Co.*, 16 Kan. 133.

Kentucky.—*Trustees of Caldwell Institute v. Young*, 63 Ky. 582.

Nebraska.—*Hoagland v. Lowe*, 39 Neb. 397, 58 N. W. 197; *Waterman v. Stout*, 38 Neb. 396, 56 N. W. 987, Henry, etc., Co. v. Fisher-dick, 37 Neb. 207, 55 N. W. 643.

Pennsylvania.—*Schenley's Appeal*, 70 Pa. St. 98.

Texas.—*Strang v. Pray*, 89 Tex. 525, 35 S. W. 1054.

only for improvements made under contract with him.³ As illustrating the interest that may be affected by the lien it is held that if a husband makes a contract for a building on his wife's land, it not being shown that he had agency or authority from her so to do, his curtesy only will be covered by the lien.⁴ This has been held so, even where his right did not attach until after the work was done.⁵ Whatever the less estate may be, such estate will be bound.⁶ A person in possession of public land with right to make improvements thereon, has an interest that may be subjected to the lien.⁷ As a rule we speak of the legal title held by the owner as being subject to the lien, but it will also attach to an equitable title, and it will follow in the hands of purchasers and assignees.^{7a} But it has been held that if the purchaser of a legal title ac-

³Hillburn v. O'Barr, 19 Ga. 591; Van Riper v. Norton, 61 Mo. App. 440; Keller v. Denmead, 68 Pa. St. 449.

Wisconsin.—Dean v. Pyncheon, 3 Chand. (Wis.) 9, 3 Pinn. (Wis.) 17. A mechanic's lien attaches to the interests of those who make the contract and to the interests of all those who authorized or knowingly permitted such contract to be made. Hughes v. McCasland, 122 Ill. App. 365.

⁴Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36. If owned jointly husband can bind. Bauer v. Long, 147 Mich. 351, 110 N. W. 1059, 118 Am. St. 552, 13 Det. Leg. N. 1018.

⁵Kirby v. Tead, 13 Metc. (Mass.) 149.

⁶McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Garrett v. Stevenson, 8 Ill. 261; Taggart v. Kem, 22 Ind. App. 271, 53 N. E. 651; Fisher v. Anslyn, 30 Mo. App. 316. A widow who occupies real estate

converted by the will, until its actual sale, under a privilege given by the will, cannot bind it by contract for repairs beyond her interest in the land, which amounts at most to a life tenancy. In re Ottinger's Estate, 17 Pa. Co. Ct. 244, 4 Pa. Dist. 711.

⁷Turney v. Saunders, 5 Ill. 527.

^{7a}Smith v. St. Paul Fire & Marine Ins. Co., 106 Iowa 225, 76 N. W. 676; Clark v. Parker, 58 Iowa 509, 12 N. W. 553; Morgan v. Bloecker, 6 Pa. Dist. 659, 41 W. N. C. (Pa.) 127. See §§ 10, 24. A husband purchased land on which he paid a portion of the price and agreed to give his note and mortgage for the balance, and was thereon let into possession without a deed. Subsequently he contracted for the erection of a house on the land, and work was commenced thereon. Held that, by having the deed executed to the wife, giving her legal title,

quires the same bona fide it will not be subject to the lien.⁸ If a vendee is in possession and afterwards acquires title the lien will attach.⁹ But in no case can the lien cover more than the contracting owner had.¹⁰ Where the equitable title afterwards merges into the legal, the lien will attach to the legal title.¹¹ And even a vendee's interest after forfeiture has been held sufficient to be subject to the lien.¹² Where labor is done for one who is the owner of the equitable title and on foreclosure the owners of the legal and equitable title are made parties, and the court orders both the legal and equitable title sold, the purchasers get a good title.¹³ A purchaser under a deed held in escrow, has an interest which may be subjected to the lien.¹⁴ Where a trustee under a will makes improvements,

he could not avoid a lien acquired by the building contractors on the title and interest held by the husband at the time of the contract. *Smith v. Woodruff*, 1 Handy (Ohio) 276. One holding a contract for a warranty deed to real estate may subject his interest in said land to a mechanic's lien and, upon acquiring legal title during the progress of the work, the lien will attach to the entire property. *Interstate Bldg. & Loan Assn. v. Ayers*, 71 Ill. App. 529.

⁸ Mechanics' liens entered against an equitable estate have their value upon that estate, and they survive or perish with it. *Campbell's Appeal*, 36 Pa. St. 247, 78 Am. Dec. 375n. It cannot prevail against a legal estate. *Gault v. Deming*, 3 Phila. (Pa.) 337.

⁹ *National Bank v. Williams*, 38 Fla. 305, 20 So. 931.

¹⁰ *Seitz v. Union Pac. R. Co.*, 16 Kan. 133; *Harsh v. Morgan*, 1 Kan. 293; *Wagar v. Briscoe*, 38

Mich. 587. Under verbal contract to convey. *Land v. Muirhead*, 31 Miss. 89. Invalid contract to convey. *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

¹¹ *Interstate Bldg. & Loan Assn. v. Ayers*, 71 Ill. App. 530; *Brown v. Jones*, 52 Minn. 484, 55 N. W. 54; *Allen v. Oxnard*, 152 Pa. St. 621, 25 Atl. 568; *Lyon v. McGuffey*, 4 Pa. St. 126, 45 Am. Dec. 675n. Second purchase. *Cochran v. Wimberly*, 44 Miss. 503.

¹² *Davis v. Elliott*, 7 Ind. App. 246, 34 N. E. 591; *Brown v. Jones*, 52 Minn. 484, 55 N. W. 54; *Kerrick v. Ruggles*, 78 Wis. 274, 47 N. W. 437.

¹³ *Lewis v. Rose*, 82 Ill. 574.

¹⁴ *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pa. 989. Cases holding that there is an equitable title. *Hamilton v. Whitson*, 5 Kan. App. 347, 48 Pac. 462; *Carey-Lombard Lumber Co. v. Bierbauer*, 76 Minn. 434, 79 N. W. 541; *Berry v. McAdams*, Tex.

he may be made to pay a lien in installments out of rent.¹⁵

§ 141. **Leaseholds covered by lien.**—Under most if not all statutes, leasehold interests are subject to a lien, and if the statement is properly filed, is covered by it.¹ However, the lien will only attach to the interest of the lessee, unless the statute makes the lessee the agent of the lessor; it attaches subject to all the conditions of the lease.² The landlord's interest is liable under a provision in the lease that all improvements shall become the property of the landlord in case of forfeiture. If the leasehold interest should be merged into the fee, as where the owner of the fee

Civ. App., 50 S. W. 952; *Greene v. McDonald*, 70 Vt. 372, 40 Atl. 1035.

¹⁵ *Hall v. Bullock* (Ky.), 97 S. W. 351, 29 Ky. L. 1254.

¹ See *Lessee's ownership*, § 26. See *Liability to lien*, § 10. *Asheville Woodworking Co. v. Southwick*, 119 N. Car. 611, 26 S. E. 253; *Smith Woolen Mach. Co. v. Browne*, 206 Pa. 543, 50 Atl. 43; *Sherman v. Thompson*, 7 Pa. Super. Ct. 555, 43 W. N. C. (Pa.) 150; *Wiles v. People's Gas Co.*, 7 Pa. Super. Ct. 562. The word "owner" in the first section of the act "to create a lien in favor of mechanics and others in certain cases" is not limited to an owner in fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is on the fee; if it is of a less estate, the lien is on such smaller estate. *Choteau v. Thompson*, 2 Ohio St. 114. See *Dec. & Am. Dig. tit. Mechanics' Liens*, § 191. See ante, § 44, Ohio Statute.

² **California.**—*Johnson v. Dewey*, 36 Cal. 623; *Gaskill v. Trainor*, 3 Cal. 334.

Illinois.—*Reed v. Boyd*, 84 Ill. 66.

Iowa.—*Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53 Iowa 521, 5 N. W. 693.

Kentucky.—*Laviolette v. Redding*, 4 B. Mon. (Ky.) 81; see § 143.

Missouri.—*Curtin-Clark Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476.

Destroyed by fire.—A mechanic's lien attaches to constructions and works erected on the leased premises, under a contract with a lessee, in the place of those destroyed by fire, during the lease, without his fault or negligence. *Schwartz v. Saiter*, 40 La. Ann. 264, 4 So. 77.

No Interest After Lease Expires.—Where a covenant in a lease is merely that the appraised value of the buildings erected by the tenant shall be paid for by the

purchases the interest of the lessee, the entire estate then becomes liable for the lien.³ However, this rule is only applied in cases where the purchase is made before the expiration or forfeiture of the lease.⁴ And it has been held that if the owner of the fee changed it into a leasehold after the materials are furnished, the lien might be enforced either against the fee or the leasehold.⁵ But as a general rule, only the interest of the leasehold owner is covered by a lien existing by virtue of a contract with him.⁶ Where the leasehold is liable on the lien, the landlord on sale of it is bound to accept the purchasers of the leasehold interest as tenants,⁷ or where the

lessor, no mention being made of the lessor's assigns, the lessee, after the expiration of his term, has no interest in the land itself to which, as against such assigns, a mechanic's lien can attach. *Watson v. Gardner*, 119 Ill. 312, 10 N. E. 192.

³ *Evans v. Young*, 10 Colo. 316, 15 Pac. 424, 3 Am. St. 583; *Dobschuetz v. Holliday*, 82 Ill. 371; *Curtin-Clark Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476.

⁴ *Masow v. Fife*, 10 Wash. 528, 39 Pac. 140.

⁵ *Goldheim v. Clark*, 68 Md. 498, 13 Atl. 363.

⁶ *Illinois*.—*Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 36 Am. St. 486, 21 L. R. A. 489.

Indiana.—*McCarty v. Burnet*, 84 Ind. 23.

Nebraska.—*Moore v. Vaughn*, 42 Neb. 696, 60 N. W. 914.

Ohio.—*Dutro v. Wilson*, 4 Ohio St. 101.

Rhode Island.—*Poole v. Fellows*, 25 R. I. 64, 54 Atl. 772.

Washington.—*Masow v. Fife*, 10 Wash. 528, 39 Pac. 140; *Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265.

Ground Rent.—A material man, selling materials to a lessee to erect buildings on the leased property with knowledge that a ground rent is reserved to the owner, cannot subject the ground rent to the payment of his claim. *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Tenant at will, person put in possession to build house may create lien on house. *Williamson v. Shank*, 41 Ind. App. 513, 83 N. E. 641.

⁷ *Koenig v. Mueller*, 39 Mo. 165. A building erected by a tenant cannot be subjected to a mechanic's lien for materials sold to him as against a subsequent purchaser of the land for valuable consideration without notice of the lien or of the tenant's claim to the building. *Denison Lumber Co. v. Milburn*, (Tex. Civ. App.) 107 S. W. 1161.

lien is upon the building, he must suffer its removal,⁸ or if the tenant has a right to purchase, this right will go to the purchaser under foreclosure.⁹ Not merely does the improvement or building on which the labor is done become liable, but the entire interest of the leaseholder is covered by the lien.¹⁰ Under statutes making the landlord's interest liable, payment by him to the tenant for the costs of the improvement will not defeat the lien,¹¹ nor can a tenant defeat the lien by a voluntary surrender after the materials are furnished, even though the lease so provides.¹² Where the tenancy has expired and there is no provision for removal the lien right is lost.¹³ But the fact that improvements cannot be removed will not defeat the right to a lien; the interest of the lessee whatever that may be can be sold.¹⁴ Where the rights of a sublessee are recognized, he has an interest that may be subjected to the lien.¹⁵

§ 142. Community property covered by lien—Homestead.—

In community property, where one in interest contracts, the entire property will be covered by the lien; and as a general rule homestead property is subject to the mechanic's lien,¹

⁸ *Montana Lumber & Mfg. Co. v. Obelisk Min., &c., Co.* 15 Mont. 20, 37 Pac. 897.

⁹ *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174.

¹⁰ *Montana Lumber & Mfg. Co. v. Obelisk Min., &c., Co.*, 15 Mont. 20, 37 Pac. 897.

¹¹ *Scroggin v. National Lumber Co.*, 41 Neb. 195, 59 N. W. 548.

¹² *McAnally v. Glidden*, 30 Ind. App. 22, 65 N. E. 291; *Hagan v. Gaskill*, 42 N. J. Eq. 215, 6 Atl. 879.

¹³ *Evans v. Judson*, 120 Cal. 282, 52 Pac. 585.

¹⁴ *Alabama State Fair & Agricultural Assn. v. Alabama Gas*

Fixture & Plumbing Co., 131 Ala. 256, 31 So. 26.

¹⁵ *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

¹ *House v. Schulze*, 21 Tex. Civ. App. 243, 52 S. W. 654. See § 10. Under Rev. St., Wis., § 3314, providing for a mechanic's lien upon land upon which buildings are erected not to exceed 40 acres, a defendant cannot insist upon particular portions, different from the government subdivision upon which the buildings are situated, being subjected to such liens, on the ground that the remaining portions constitute his home-

although there are some statutes and decisions exempting homesteads.² The promoters of a corporation cannot charge property to be afterwards acquired by a corporation with a mechanic's lien.³ However if the promoters were under contract to take a certain interest in the new concern after its incorporation, a lien may be enforced against their interests in the new corporation,⁴ and if the incorporators have knowledge that the building was erected in pursuance of such contract the corporation will be liable.⁵ The owner may be estopped by his conduct from asserting that he does not own property, or that it is not subject to a lien and equity will decline to hear him to the contrary. If he represents that he has an interest which the law recognizes as subject to a lien and afterwards in fact acquires such an interest it will be subject to a lien.⁶ And this could happen although he were not a party

stead. *Darling v. Neumeister*, 99 Wis. 426, 75 N. W. 175.

² *Morgan v. Bentheim*, 10 S. D. 650, 75 N. W. 204; *Fallihee v. Wittmayer*, 9 S. D. 479, 70 N. W. 642. Where a lien does not attach to homestead rights of wife in land owned jointly by her and her husband, because the contract for improvements was signed by the husband only, though with her knowledge and consent, the improvements, consisting of an original building, are subject to lien, and may be removed, under Lien Law 1891, § 9, subd. 4, providing that, where materials and labor are furnished in the construction of an original building since the attaching of any prior title to the land, the court may direct the building to be separately sold, and the purchaser may remove it, or the court may take

an account and ascertain the separate values of the land and building, and distribute the proceeds so as to secure to the prior title priority on the land, and to the mechanic's lien priority on the building. *Jossman v. Rice*, 121 Mich. 270, 80 N. W. 25.

³ *Davis v. Maysville*, 63 Mo. App. 477; *Davis v. Owings*, 2 Mo. App. R. 847; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436.

⁴ This question was suggested but not passed upon. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436. *Davis Rankin Bldg., &c., Co. v. Vice*, 16 Ind. App. 117, 43 N. E. 889.

⁵ *Waddy Blue Grass Creamery Co. v. Davis-Rankin Bldg., &c., Co.*, 103 Ky. 579, 45 S. W. 895.

⁶ *Floete v. Brown*, 104 Iowa 154, 73 N. W. 483.

to the contract.⁷ Likewise if the owner ratifies a contract which was made before he was in fact such owner, he cannot be heard afterwards to assert the contrary.⁸ And so, if the true owner stands by while another is making a contract and encourages the builder to perform the same, the court will decline to hear his plea of non-liability.⁹ But to hold a landlord's interest liable, more than a mere acquiescence is required.¹⁰

§ 143. **Lien on interest of landlord or vendor for improvements made by tenant or purchaser.**—Unless the statute so authorizes, the reversionary interest of the landlord is not liable for improvements made by a tenant.¹ And in the absence of such statutes, the building cannot be torn down and moved off in pièces, where the lien attaches to the land and

⁷ *Lindsley v. Parks*, 17 Tex. Civ. App. 527, 43 S. W. 277.

⁸ *Commonwealth Title Insurance & Trust Co. v. Ellis*, 22 Pa. Co. Ct. 86, 8 Pa. Dist. 5.

⁹ *Bastrup v. Prendergast*, 179 Ill. 553, 53 N. E. 995.

Suffering vendor to remain in possession.—A person who purchases land from another, and suffers the vendor to remain in possession under a contract to build a house thereon and occupy the same a specified time, has no equity against persons claiming mechanic's liens for materials furnished the vendor with which to build the house. *Buckstaff v. Dunbar*, 15 Neb. 114, 17 N. W. 345.

¹⁰ *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, 48 Pac. 1097; see § 35.

¹ *Arizona*.—*Gates v. Fredericks*, 5 Ariz. 343, 52 Pac. 1118.

Illinois.—*Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476; *Judson v. Stephens*, 75 Ill. 255.

Indiana.—*Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132; *Wilkinson v. Rust*, 57 Ind. 172.

Maryland.—*Beehler v. Ijams*, 72 Md. 193, 19 Atl. 646; *Gable v. Preachers' Fund Soc.*, 59 Md. 455; *Hoffman v. McColgan*, 81 Md. 390, 32 Atl. 179.

Mississippi.—*Kirk v. Talliaferro*, 16 Miss. 754.

Montana.—*Stenberg v. Lienemann*, 20 Mont. 457, 52 Pac. 84.

Nebraska.—*Moore v. Vaughn*, 42 Neb. 696, 60 N. W. 914.

Ohio.—*Filberl v. Davis*, 4 Ohio Dec. 496, 4 W. L. Bull. 629, 2 Cleve. Law Rep. 265.

Oregon.—*Patterson v. Gallagher*, 25 Ore. 227, 35 Pac. 454, 42 Am. St. 794.

Wisconsin.—*Allfree Mfg. Co. v. Henry*, 96 Wis. 327, 71 N. W. 370. See Dec. & Am. Dig. tit. Mechanics' Liens, § 192. See ante, §§ 12, 26.

not to the building alone.² If the lease provides for the erection of a specified building by the lessee, then the lessee is the lessor's agent, and the lessor's interest is liable.³ The fact that the lessee is to do the work at his own cost, will not relieve the landlord under some statutes.^{3a} But in order to hold the lessor's interest, the improvement must be one agreed upon,⁴ or consented to.⁵ That the building is to become the lessor's after the leases have expired will not be sufficient to bind the lessor's interest for a claim incurred in making the improvement.⁶ Unless the vendor has ceased to be the owner of the legal title,⁷ or the assertion of his claim for the unpaid purchase price will work a legal fraud upon the rights of innocent third persons, the vendor's claim is superior to the claim of a mechanic for improvements made under contract with the purchaser.⁸ An

² *Gaskill v. Davis*, 61 Ga. 644.

³ Where the lease merely stipulates that a certain sum shall be expended, then the lien will not attach to reversionary interest. *Morrow v. Merritt*, 16 Utah 412, 52 Pac. 667. *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; *Hankinson v. Valentine*, 152 N. Y. 20, 46 N. E. 292; *Mosher v. Lewis*, 14 App. Div. (N. Y.) 565, 43 N. Y. Supp. 1052; *Santa Monica Lumber & Mill Co. v. Hege* (Cal.), 48 Pac. 69.

Laying sidewalk.—A mechanic's lien may be filed, as against the owner of premises for laying a sidewalk at the request of lessees in possession having permission from the owner to alter and repair the premises, particularly where the lessees agreed to improve the premises, and the taking up of the old and the laying of the new sidewalk were neces-

sary to effect the improvements; it appearing also that an ordinance required owners or lessees to maintain sidewalks of a kind different from that taken up, for laying of which the mechanic's lien law (Laws N. Y. 1885, c. 342), gives a lien when done with the consent of the owner. *Mosher v. Lewis*, 14 App. Div. (N. Y.) 565, 43 N. Y. Supp. 1052.

^{3a} *Curtin-Clark Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476.

⁴ *Hankinson v. Valentine*, 152 N. Y. 20, 46 N. E. 292.

⁵ *Hankinson v. Valentine*, 152 N. Y. 20, 46 N. E. 292; *Hammond v. Martin*, 15 Tex. App. 347, 40 S. W. 347.

⁶ *Hankinson v. Valentine*, 152 N. Y. 20, 46 N. E. 292.

⁷ *Adam v. Russell*, 85 Ill. 284.

⁸ *Arizona*.—*Bremen v. Foreman*, 1 Ariz. 413, 25 Pac. 539.

option to purchase, with possession in the purchaser, which is not consummated, will not defeat the vendor's priority over the mechanic.⁹ The only interest that can be reached by the lien claim is the purchaser's right.¹⁰ If the vendor purchases the vendee's interest in the property and as a part consideration therefor agrees to pay the lien, of course the property is liable.¹¹ In a case where a purchaser was in possession holding bond for a deed, and a portion of the price had been paid, and the bond was canceled and premises surrendered, it was held that the vendor's interest was liable for materials furnished under a contract with the vendee.¹²

Arkansas.—*Thomas v. Ellison*, 57 Ark. 481, 22 S. W. 95.

Iowa.—*Wilkins v. Litchfield*, 69 Iowa 465.

Kansas.—*Harsh v. Morgan*, 1 Kan. 293.

New York.—*Gay v. Brown*, 1 E. D. Smith (N. Y.) 725. See § 24. Where the owner of land contracts to sell it and advance money to the purchaser to build thereon, a mechanic's lien for labor performed, filed before the giving of the deed, affects the title of the purchaser only. *Hallahan v. Herbert*, 4 Daly 209, 11 Abb. Prac. 326.

⁹ **Idaho.**—*Steel v. Argentine Min. Co.*, 4 Idaho 505, 42 Pac. 585.

Montana.—*Block v. Murray*, 12 Mont. 545, 31 Pac. 550.

Nebraska.—*Fuller v. Pauley*, 48 Neb. 138, 66 N. W. 1115; *Burlingim v. Warner*, 39 Neb. 493, 58 N. W. 132.

Ohio.—*Mutual Aid Building & Loan Co. v. Gashe*, 56 Ohio St. 273, 46 N. E. 985.

Texas.—*Smith v. Huckaby*, 4 Tex. Civ. App. 80, 23 S. W. 397.

Washington.—*Iliff v. Forssell*, 7

Wash. 225, 34 Pac. 928; *St. Paul, &c., Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787.

¹⁰ *Johnson v. Badger Lumber Co.*, 8 Kan. App. 580, 55 Pac. 517; *Getto v. Friend*, 46 Kan. 24, 26 Pac. 473; *Mentzer v. Peters*, 6 Wash. 540, 33 Pac. 1078; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918. Where the owner of land contracts to sell it and advance money to the purchaser to build thereon, a mechanic's lien for labor performed, filed before the giving of the deed, affects the title of the purchaser only. *Hallahan v. Herbert*, 4 Daly (N. Y.) 209, 11 Abb. Pr. (N. Y.) 325.

¹¹ *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485.

¹² *Rusche v. Pittman*, 34 Ind. App. 159, 70 N. E. 382. An agreement with a conditional purchaser of land that improvements thereon must be made at his cost and the owner will not be liable for labor or material, will not relieve the land from the lien on default of the purchaser, as the owner of the land, to protect it

§ 144. **Priority between mechanics and material men.**—The matter of priority of liens between different persons furnishing material or work for the same building is largely regulated by statute and where there is no statute, all will stand on an equality.¹ In all cases, the claimant must pursue the way pointed out by the statute, if he is to have any preference.² There is no priority between the claims for labor and those for material furnished upon the same building and within the same period, and by persons in the same class.³ A contractor

from statutory liens, must give the statutory notice, or some notice equivalent thereto. *Ah Louis v. Harwood*, 140 Cal. 500, 74 Pac. 41. The purchaser agreed to pay a part of the price on delivery of the deeds, and to secure the balance by a mortgage, to be junior to another mortgage to be placed thereon by the purchaser, not to exceed \$1,500, to secure funds with which to pay for improvements which he agreed to make. The purchaser did not make the first payment, but, with the consent of the owner, made the improvements, but did not negotiate the mortgage. Held, that persons furnishing material and labor in making such improvement are entitled to a lien on the premises to an amount not exceeding \$1,500. *Jones v. Osborn*, 108 Iowa 409, 79 N. W. 143.

¹ *Illinois*.—*Mehrle v. Dunne*, 75 Ill. 239; *Buchter v. Dew*, 39 Ill. 40.

Louisiana.—*Succession of Erard*, 6 Rob. (La.) 333; *Nolte v. His Creditors*, 6 Mart. (N. S.) (La.) 168.

New Jersey.—*Donnelly v. Johnes*, 58 N. J. Eq. 442; 44 Atl.

180; *Leary v. Lamont*, (N. J. Eq.) 42 Atl. 97.

Ohio.—*Choteau v. Thompson*, 2 Ohio St. 114.

Oregon.—*Willamette Falls Transp. & Mill Co. v. Riley*, 1 Ore. 183.

Pennsylvania.—*Babb v. Reed*, 5 Rawle (Pa.) 151, 28 Am. Dec. 650.

Federal.—*In re Hoyt*, 3 Biss 436, Fed. Cas. No. 6,805. See Dec. & Am. Dig. tit. Mechanics' Liens, § 194.

² *Kendall v. Pickard*, 67 N. H. 470, 32 Atl. 763; *Public Schools in Trenton v. Heath*, 15 N. J. Eq. 22.

³ *Bradley & Currier Co. v. Ward*, 15 App. Div. (N. Y.) 386, 44 N. Y. Supp. 164; *Moxley v. Shepard*, 3 Cal. 64; *Henry v. Coatsworth Co. v. Fisherick*, 37 Neb. 207, 55 N. W. 643; *Leary v. Lamont* (N. J. Eq.) 42 Atl. 97. Under statutes which provide that a payment by the owner before notice will release that amount from liability to a lien, a bona fide assignment of the same by the contractor, gives to the assignee a priority to the extent of the amount assigned. *Hall v. City of New York*, 79 App. Div. (N. Y.) 102, 79 N. Y. Supp. 979.

must yield priority in the funds arising from the sale of the building to those who have been employed by him,⁴ as well as to claims of material men under him.⁵ He must wait until these are paid before he can participate in the distribution.⁶ There is no uniformity as to the rights of subcontractors and some courts hold that the one perfecting his claim first, is entitled to priority over his fellow subcontractor or material man,⁷ while others hold,—and this seems the better doctrine—that all who comply with the law within the time permitted shall share *pro rata*.⁸

§ 145. Priority between mechanics and material men—Assignment of contract.—The assignee of a contract stands in no better position than his assignor.⁹ In one case the defendant, a subcontractor under a contractor on a building, filed his lien for work and materials the same day an assignment of the contractor's claim and a lien therefor were filed, but several hours

⁴ *Thomas v. Stewart*, 132 N. Y. 580, 30 N. E. 577; *Lay v. Millette*, 1 Phila. (Pa.) 513.

⁵ *Pell v. Baur*, 133 N. Y. 377, 31 N. E. 324.

⁶ *Vogel v. Luitwieler*, 52 Hun (N. Y.) 184, 5 N. Y. Supp. 154.

⁷ *Wood v. Grifenhagen*, 37 Misc. (N. Y.) 553, 75 N. Y. Supp. 1014. Workmen and materialmen who serve stop orders under the statute, on the owner, in regard to the money due or to become due to the contractor, are entitled to be paid in the order of priority in which notices are served, and not *pro rata*. *Smith v. Dodge & Bliss Co.*, 59 N. J. Eq. 584, 44 Atl. 639. Where a subcontractor has complied with Code, Va. § 2479, providing that if, before furnishing material to a general contractor, he shall give notice to the owner that he is about to fur-

nish such material, and within 30 days after it is furnished shall give a verified account thereof to the owner and contractor, the owner shall become personally liable therefor, such claim should be allowed in full in an action to apportion among subcontractors a balance due the general contractor by the owner. *Schrieber v. Citizens' Bank*, 99 Va. 257, 38 S. E. 134, 3 Va. Sup. Ct. Rep. 185.

⁸ *Beardsley v. Brown*, 71 Ill. App. 199; *Bayonne Building & Loan Assn. v. Williams*, 57 N. J. Eq. 503, 42 Atl. 172; *Baumgarten v. Mauer*, (Tex. Civ. App.), 60 S. W. 451; *Long v. Abeles & Co.*, (Ark.) 93 S. W. 67.

⁹ *Andrews & Hitchcock Iron Co. v. Smead Heating & Ventilating Co.*, 7 Ohio N. P. 439, 5 Ohio S. & C. P. Dec. 292.

thereafter. It was held that the defendant's lien must take precedence, plaintiff having acquired no greater rights than those of his assignor.¹⁰

§ 146. **Generally no priority by reason of time of furnishing work or materials.**—As a general rule, there is no priority resting upon the priority of time of beginning work or furnishing materials, if done or furnished within the time limit,¹ or in the time of making,² or filing the contract.³ Under some statutes mechanics are entitled to liens in the order of the filing of their claims.⁴ Other statutes provide that all liens filed within the period allowed by law shall share equally.⁵ And still others give priority to the one first furnishing the material.⁶ Where the liens of some of the contractors are prior to incumbrances, and the liens of others are later than the incumbrances, they should be paid in this order,⁷ and this may be true, even though there is no priority between the mechanic's liens.⁸ But where a statute directs that all liens shall stand upon an equal footing an intervening incumbrance is subject to all liens.⁹ As a rule it may be said that all persons making the contract with the owner are in one class and as between themselves

¹⁰ *English v. Lee*, 63 Hun (N. Y.) 572, 18 N. Y. Supp. 576.

¹ *Crowell v. Gilmore*, 18 Cal. 370.

² *Wing v. Carr*, 86 Ill. 347.

³ *Jamison v. Barelli*, 20 La. Ann. 452.

⁴ *Robertson v. Barrack*, 80 Iowa 538, 45 N. W. 1062; *Kaylor v. O'Connor*, 1 E. D. Smith (N. Y.) 672.

⁵ *St. Louis v. O'Neill Lumber Co.*, 114 Mo. 74, 21 S. W. 484; *Bayonne Building & Loan Assn. v. Williams*, 57 N. J. Eq. 503, 42 Atl. 172.

⁶ *Morrison v. Carey-Lombard Co.*, 9 Utah, 70, 33 Pac. 238.

⁷ *Crowell v. Gilmore*, 18 Cal. 370; *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645.

⁸ As between mechanics' liens, the law allows no priority; but where a mortgage takes effect after the commencement of one or more mechanics' liens, but before the commencement of others, the subsequent liens must be postponed to the mortgage lien, though this disposition also postpones them to the prior mechanics' liens. *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544.

⁹ *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S. W. 652, 53 Am. St. 790, 30 L. R. A. 765.

share pro rata, likewise all contracting with a principal contractor share pro rata in the fund coming to him, and so on ad infinitum.¹⁰ This may be varied by statutory provisions.¹¹ If the constitution provides for an equality among lien holders this cannot be changed by the legislature.¹²

§ 147. Equality of liens upon same job—Ohio statute.—Section 3188 of the Ohio Statutes provides that if several liens be obtained by several persons, upon the same job, in the manner prescribed in the foregoing sections, they shall have no priority among themselves, and a lien of a promissory note described in any statement filed as provided in said sections shall take effect from the date of the first of the items, included in it; all payments on said liens shall be made pro rata.¹ Under this section, all persons having liens for the work on the same job, share equally in whatever proceeds may be realized under the lien. "Job" is the whole of a thing done. The same job here would include all who had done work on the structure considered as an entirety. If the matter under consideration was the building of a house, then it will in-

¹⁰ *Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294; *McConologue v. Larkins*, 32 Misc. (N. Y.) 166, 66 N. Y. Supp. 188; *Saginaw Bay Co. v. Engel*, 9 Ohio Cir. Ct. 632, 10 Ohio Cir. Dec. 234; *Keim v. McRoberts*, 18 Pa. Super. Ct. 167. Mechanic does not include subcontractor. *Miltimore v. Nofziger Bros. Lumber Co.*, 150 Cal. 790, 90 Pac. 114.

¹¹ Under Acts 23d Gen. Assem. Iowa, c. 48, providing that when the property of any firm or corporation shall be seized under process or put in the hands of a receiver, debts owing to laborers "shall be considered and treated as preferred * * * and shall be paid first," labor claimants, who have performed labor for a

corporation whose property has been transferred to a receiver, are entitled to a preference over the holders of mechanics' liens filed against the same property before the corporation acquired it. *Haw v. Burch*, 110 Iowa 234, 81 N. W. 460. After the 10 days, the funds due before are to be regarded as appropriated, to the extent of the liens filed before the expiration of the 10 days. *Saginaw Bay Co. v. Engel*, 9 Ohio Cir. Ct. 632, 10 Ohio Cir. Dec. 234.

¹² *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262.

¹ 95 Ohio Laws 211; 91 Ohio Laws 135; 84 Ohio Laws 46, 47; Rev. Stat. 1880; 74 Ohio Laws, 168, § 5.

clude whatever may be reached by a lien on the house. This equality, however, may be disturbed in cases where one creditor had a lien on another fund or property; then in equity he will be required to exhaust such other fund before he can participate in the one under the same job.² So too, the equality will be destroyed where one proceeded strictly according to the law, and the other did not or where some intervening rights have been acquired. Thus, if after one has commenced his work, and before another has done so, a mortgage is put on the premises, then as a matter of course, the latter will be postponed to the mortgage lien.³ But equities being equal, the legislature intended an equal distribution.⁴ And under ordinary circumstances, one lien holder should not have priority over another.⁵ The lien is prior to a levy made after it has attached.⁶ As between the subcontractors, all in the same class will pro rate equally, but where a subcontractor gives notice, his lien on the fund is prior to that of an attaching creditor.⁷ Where material men furnished material to a contractor the material of one being used, and that of another not, the query has been made whether the equity of the one furnishing should not be considered superior to the other.⁸ A vendor's lien is prior to that of a mechanic,⁹ the mechanic merely having a lien on the interest of the purchaser.¹⁰ Where the progress of the completion of a house is suspended by decease of the

² Fassett v. Traber, 20 Ohio St. 540. See § 241.

³ Hazard Powder Co. v. Loomis, 13 Ohio Dec. (Re.) 333, 2 Disney Ohio 544.

⁴ Choteau v. Thompson, 2 Ohio St. 114.

⁵ Ohio Savings, Loan, &c., Co. v. Johnson, 10 Ohio Cir. Dec. 752, 20 Ohio C. C. 96.

⁶ Gibbons v. Brewer, 1 O. S. U. 554, 37 Wkly. L. Bull. 90.

⁷ McCullom v. Richardson, 12

Ohio Dec. (Re.) 440, 2 Handy (Ohio) 274.

⁸ Bender v. Stettinius, 10 Ohio Dec. (Re.) 186, 19 Wkly. L. Bull. 163.

⁹ Mutual Aid Bldg. & Loan Co. v. Gashe, 56 Ohio St. 273, 46 N. E. 985.

¹⁰ Neil v. Kinney, 11 Ohio St. 58; Walbridge v. Barrett, 11 Ohio Cir. Dec. 634, 21 Ohio C. C. 522; Anderson v. Gregg, 6 Ohio Cir. Dec. 629, 10 Ohio C. C. 311.

owner, the priority of a material man is not lost to the benefit of an attaching creditor on a levy made after decease of the owner.¹¹ Mortgages given before the lien attaches, of course are prior to the lien.¹² But if the mortgage is given after commencement of the work or furnishing of the material then the claim of the mechanic is prior.¹³ This will be true although the mortgage was given for funds procured in the erection of the building.¹⁴ A mortgage given for advances placed on record prior to the attaching of the lien will be prior to such lien, but it might be otherwise if there was an agreement to hold some of the money.¹⁵ The mechanic is bound to look to the title of the property, when he furnishes his material or labor, and cannot claim a lien on a larger interest therein than is held by the owner.¹⁶ Creditors of a head contractor who have secured their claims prior to the giving of notice by subcontractor, are entitled to priority over the latter.¹⁷ The assignees of contracts, standing in the place of contractors, are subordinate to the claims of material men which have been acquired in the property.¹⁸

¹¹ *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228.

¹² *Choteau v. Thompson*, 2 Ohio St. 114; *West v. Klotz*, 37 Ohio St. 420, 6 Wkly. L. Bull. 763; *Felke v. Railway Co.*, 5 Ohio Cir. Dec. 640, 12 Ohio C. C. 362; *Toledo, &c., R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. 546, 6 Ohio Fed. Dec. 537; *In re Cincinnati Consumers Brew. Co.*, 9 Ohio Dec. 519, 6 Ohio N. P. 472.

¹³ *Choteau v. Thompson*, 2 Ohio St. 114; *Standard Oil Co. v. Sowden*, 55 Ohio St. 332, 46 N. E. 320; *Mutual Aid Bldg., &c., Co. v. Gashe*, 6 Ohio Cir. Dec. 779, 18 Ohio C. C. 681.

¹⁴ *Mutual Aid Bldg. &c., L. Co.*

v. Gashe, 6 Ohio Cir. Dec. 779, 18 Ohio C. C. 681.

¹⁵ *Kesting v. Donahue*, 6 Ohio Cir. Dec. 262, 13 Ohio C. C. 653, 2 Ohio Dec. 567.

¹⁶ *Mutual Aid Bldg. & L. Co. v. Gashe*, 56 Ohio St. 273, 46 N. E. 985. As to how distribution made, where a lien is secured and the owner afterwards places a mortgage upon the property, and afterward the second contractor secures a lien, see *Ohio Savings, Loan, &c., Co. v. Johnson*, 10 Ohio Cir. Dec. 752.

¹⁷ *Bergin v. Braun*, 15 Ohio Dec. 383, 3 Ohio N. P. (N. S.) 150.

¹⁸ *Andrews, &c., Iron Co. v. Smead Heating, &c., Co.*, 5 Ohio Dec. 292, 7 Ohio N. P. 439.

§ 148. **Pro rata payment of subcontractors out of subsequent payments due head contractors—Ohio statute.**—Section 3197 of the Ohio statutes provides that all other subcontractors, material men, laborers, mechanics or persons furnishing material, fuel or machinery who, before the first subsequent payment falls due after the deposit of a copy of such statement with the county recorder by any subcontractor, material or machinery man, laborer, or person furnishing material, or within ten days thereafter, file with such owner, board, officer or authorized clerk, agent or attorney thereof, a sworn and itemized statement or estimate of the labor, machinery, fuel or material furnished or to be furnished by them under a contract with a principal or subcontractor, containing a description of any promissory note or notes given for the same, or any part thereof, shall be paid pro rata with the person first so filing such statement and with each other, out of said first and other subsequent payments so falling due; but upon failure so to do, they shall have no recourse against the owner, board, officer, or the clerk or agent thereof for any prior payments made under his contract with his head contractor or subcontractor.¹⁹

148a. **Priority—Indiana Statute.**—

1. *When lien attaches.*

Liens duly filed for record are deemed recorded from the time they are filed in the office of the county recorder for that purpose,¹ whether the recorder actually copies them into the proper record or not.² Even if he should erroneously record a lien in a book not authorized by law, instead of the miscel-

¹⁹ 97 Ohio Laws 501. See §§ 90, 91, 147.

¹ *Wilson v. Hopkins*, 51 Ind. 231; *Northwestern, etc., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

² *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Northwestern, etc., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130; *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 591, 73 N. E. 273.

laneous record,³ the lien will not thereby be defeated any more than if it had not been copied into a book at all.⁴ But when a lien is recorded in the wrong book the unauthorized record thus made will not be competent evidence in a court as a proper record of the lien would be.⁵

A mechanic's lien is perfected, and in that sense is acquired by filing a proper notice;⁶ and where the notice is not filed within the time allowed there can be no lien, except in favor of employes of corporations and others for work done in carrying on a business for which the claimant's wages are unpaid.⁷ All liens so created by filing notices shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery,⁸ and shall have priority over all liens suffered or created thereafter, except the liens of other mechanics and material men, as to which there shall be no priority.⁹

2. *Priority as against mortgages.*

Under the foregoing rule a mortgage executed before the work was begun or the first of the materials were furnished is prior to mechanics' liens,¹⁰ so far as the land itself is con-

³ *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Northwestern, etc., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130; *Wilson v. Hopkins*, 51 Ind. 231.

⁴ *Wilson v. Hopkins*, 51 Ind. 231.

⁵ *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883; *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108.

⁶ *Wilson v. Hopkins*, 51 Ind. 231; *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Northwestern, etc., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130; *Sulzer Vogt. M. Co. v. Rushville Water*

Co., 160 Ind. 202, 65 N. E. 583.

⁷ *Burns'* 1908, § 7976, 7983, 8288, 8289.

⁸ Acts 1909, p. 295 § 4, re-enacting *Burns'* 1908, § 8298. *Mark v. Murphy*, 76 Ind. 534; *Fleming v. Bumgarner*, 29 Ind. 424; *Zehner v. Johnston*, 22 Ind. App. 452, 53 N. E. 1080; *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

⁹ Acts 1909, p. 295, § 4, re-enacting *Burns'* 1908, § 8298.

¹⁰ *Thorpe Block, etc., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978; *Zehner v. Johnston*, 22 Ind.

cerned,¹¹ unless the mortgagee's failure to record his mortgage within the time allowed by the statute shall defeat its priority.¹² But actual notice of an unrecorded conveyance or encumbrance is as effective as the constructive notice afforded by recording it;¹³ and mechanics and material men are charged with notice of the title of a person in actual possession of land claiming title under a conveyance that has not been recorded.¹⁴ If a mortgage executed prior to the attaching of a mechanic's lien is withheld from record beyond the statutory period of forty-five days allowed for recording mortgages¹⁵ and is afterward recorded, mechanics' liens for labor done and materials furnished before it was actually recorded will have priority.¹⁶ Where the mortgage itself was duly recorded, delay in recording an assignment was held not to affect the assignee's priority.¹⁷ Mechanics' liens also have priority over a mortgage executed between the date when the first labor is performed or the first materials are furnished and the date of filing the notice.¹⁸

3. *Priority as against wife's inchoate interest.*

The inchoate (dower) interest of a wife in her husband's lands is not subject to a mechanic's lien thereon;¹⁹ and where that interest becomes vested by virtue of a judicial sale, either

App. 452, 53 N. E. 1080; *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 591, 73 N. E. 273.

¹¹ Acts 1909, p. 295, § 2, reenacting Burns' 1908, § 8296.

¹² *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632.

¹³ *State v. Backus*, 160 Ind. 682, 67 N. E. 512.

¹⁴ *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 592, 73 N. E. 273.

¹⁵ Burns 1908, § 3962.

¹⁶ *Jenckes v. Jenckes*, 145 Ind.

624, 44 N. E. 632. This case was overruled as to another point. *Sulzer-Vogt M. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583; *McDaniel v. Osborn*, 166 Ind. 1, 75 N. E. 647.

¹⁷ *Zehner v. Johnston*, 22 Ind. App. 452, 458, 53 N. E. 1080. See Burns' 1908, §§ 1146-1149.

¹⁸ *Northwestern, etc., Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

¹⁹ *Mark v. Murphy*, 76 Ind. 534.

upon a decree for the foreclosure of such lien²⁰ or otherwise, or by the husband's death,²¹ the wife's interest may be held, assigned and set off by partition, freed from the lien. Accordingly it was held that where a wife joined in the execution of a mortgage on her husband's land that was already subject to a mechanic's lien the mortgage had priority as to her one-third interest.²² And where the estate of a decedent, which was set off to his widow under the statute²³ as being worth less than five hundred dollars, included land against which a mechanic's lien had been filed for his debt, the widow's right was held superior to the mechanic's lien.²⁴

4. *Continuance and loss of priority.*

A prior mortgage will be kept alive and not permitted to merge in a title subsequently acquired when necessary to protect the good faith purchaser of such title against a mechanic's lien, as in the case of other liens.²⁵ The priority of a mortgage may be waived in favor of subsequent mechanics' liens, either by an express agreement to waive it in favor of the expense of making improvements,²⁶ or by acts or omissions with relation to such liens which make it inequitable that the mortgagee should hold an acquired priority.²⁷

The priority of a mechanic's lien over junior mortgages,²⁸ as well as its effect as a lien on the interest of the owner²⁹ ceases,

²⁰ *Mark v. Murphy*, 76 Ind. 534.

²¹ *Lloyd v. Arney*, —Ind. App. —, 87 N. E. 989.

²² *Mark v. Murphy*, 76 Ind. 534.

²³ *Burns'* 1908, § 2944-2946.

²⁴ *Lloyd v. Arney*, —Ind. App. —, 87 N. E. 989.

²⁵ *Coburn v. Stephens*, 137 Ind. 683, 688, 36 N. E. 132.

²⁶ *Claypool v. German F. Ins. Co.*, 32 Ind. App. 540, 70 N. E. 281.

²⁷ *Thorpe Block, etc., Assn. v.*

James, 13 Ind. App. 522, 41 N. E. 978.

²⁸ *Deming-Colburn Co. v. Union, etc., Assn.*, 151 Ind. 463, 51 N. E. 936; *Stoermer v. Peoples' Bank*, 152 Ind. 104, 52 N. E. 606; *Union, etc., Assn. v. Helberg*, 152 Ind. 139, 51 N. E. 916; *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

²⁹ *Acts 1909*, p. 297, § 5, re-enacting *Burns'* 1908, § 8299. *Acts 1909*, p. 335, §§ 3, 4.

and the lien becomes absolutely void as against such mortgagee, unless he is made a party to a suit to foreclose it within one year. A foreclosure against the owner without joining the junior mortgagee results in the lien becoming void as against the latter upon the expiration of the year allowed for foreclosing.³⁰ And where a mechanic's lien had been foreclosed without making the holder of a junior mortgage a party to the suit, and the lienholder had become the purchaser of the land at foreclosure sale, it was held that he had merely the right which the owner would have had to redeem from the junior mortgage; all his rights as a lienholder had expired when the year for bringing suit to enforce his lien ended.³¹

5. *Removal of buildings.*

Where mortgaged property is improved by the erection of new buildings the priority of the mortgage is confined to the land as it was before the improvements were made.³² A mechanic's lien, so far as concerns the buildings erected by the lien holder, is not impaired by the foreclosure of the mortgage; but such buildings may be sold to satisfy the lien and removed within ninety days after the sale by the purchaser.³³ The same rule as to permitting the sale and removal of the buildings applies when the person who erected them had only a leasehold interest in the land.³⁴ But the priority of the mechanic's lien over the mortgage is strictly confined to "build-

³⁰ *Deming-Colburn Co. v. Union, etc., Assn.*, 151 Ind. 463, 51 N. E. 936; *Stoermer v. Peoples' Bank*, 152 Ind. 104, 52 N. E. 606; *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

³¹ *Union, etc., Assn. v. Helberg*, 152 Ind. 139, 51 N. E. 916.

³² Acts 1909, p. 295, § 2, re-enacting Burns' 1908, § 8296.

³³ Acts 1909, p. 295, § 2, re-enacting Burns' 1908, § 8296. *Building, etc., Assn. v. Coeburn*, 150 Ind. 684, 50 N. E. 885; *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

³⁴ Acts 1909, p. 295, § 2, re-enacting Burns' 1908, § 8296.

ings erected by said lien holder.”³⁵ No benefit which the improvements may have conferred on the mortgagee by affording him additional security can affect his priority, or enlarge the rights of laborers and material men.³⁶ Neither the interest of an owner nor of a mortgagee in existing buildings can be affected by a lien for repairs thereto made without the authority of the owner or encumbrancer thus sought to be charged.³⁷ But a lien for such repairs can be enforced against the interest of the person who caused them to be made, whether a leasehold interest³⁸ or otherwise.³⁹ Where such interest is merely a contract right of purchase the mechanic’s lien for improvements made by the purchaser can attach to nothing else; even the right to remove new buildings, which exists when buildings are erected by a lessee or mortgagee, is denied.⁴⁰

6. *Priority of workmen’s liens in case of insolvency.*

Although some of the earlier cases declared a contrary rule,⁴¹ the principle is now established in Indiana that a mortgage executed before the transfer of property to an assignee or receiver, or the mortgagor’s bankruptcy had given his employes a lien thereon for their wages without filing any notice,⁴²

³⁵ *Thorpe Block, etc., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978.

³⁶ *Thorpe Block, etc., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978.

³⁷ *Rusche v. Pittman*, 34 Ind. App. 159, 72 N. E. 473. See *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 233.

³⁸ *Montpellier, etc., Co. v. Stephenson*, 22 Ind. App. 175, 53 N. E. 444; *McNally v. Glidden*, 30 Ind. App. 22, 65 N. E. 291.

³⁹ *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314.

⁴⁰ *Rusche v. Pittman*, 34 Ind. App. 159, 72 N. E. 473; *Davis v. Elliott*, 7 Ind. App. 246, 34 N. E. 591; *Peoples, etc., Assn. v. Spears*, 115 Ind. 297, 17 N. E. 570.

⁴¹ *Small v. Hammes*, 156 Ind. 556, 60 N. E. 342; *Jenckes v. Jenckes*, 145 Ind. 624; 44 N. E. 432; *Bell v. Hiner*, 16 Ind. App. 184, 44 N. E. 576.

⁴² *Burns’* 1908, §§ 7976, 7983.

has priority over such lien.⁴² The earlier decisions cited above have been overruled.⁴⁴ But the lien which employees of a corporation may acquire for wages due them, by filing a notice in the recorder's office,⁴⁵ is prior to any and all liens, created or acquired, subsequent to the date of the employment of the lienor (unless he elects a later date to which the lien shall relate, and specifies it in his notice),⁴⁶ and therefore has priority over a mortgage executed after such employment began.⁴⁷

§ 149. **Priority affected by conveyances.**—A conveyance of the property made after the right to the liens has attached is made subject to the lien right.¹ And if the right be perfected, as the statute requires, within the time limit even though it is after the purchase has been made yet a purchaser's right is subordinate to the lien.² A trust deed,³ or a voluntary conveyance—though bona fide—will not be prior to the

⁴³ *McDaniel v. Osborn*, 166 Ind. 1, 75 N. E. 647.

⁴⁴ *McDaniel v. Osborn*, 166 Ind. 1, 75 N. E. 647; *Sulzer-Vogt M. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583.

⁴⁵ *Burns'* 1908, § 8289.

⁴⁶ *Burns'* 1908, §§ 8288, 8289.

⁴⁷ *Aurora Nat. Bank v. Black*, 129 Ind. 595; *McDaniel v. Osborn*, 166 Ind. 1, 75 N. E. 647.

¹ *Diggs v. Green*, 15 La. 416; *American Mortg. Co. v. Merrick Const. Co.*, 120 App. Div. (N. Y.) 150, 104 N. Y. Supp. 900.

Lumber for numerous buildings.—Where the lumber was furnished for the erection of numerous corn-cribs at several different places, and the cribs were afterwards sold to another party, it was held that, if any of them were complete when purchased

and it was not shown that any of the lumber furnished within 90 days of the purchase went into such completed cribs, then the purchaser took them free from any lien for the lumber—no statement for a lien having been filed until after the purchase. *Roose & Wainwright v. Billingsley & Nanson*, 74 Iowa 51. See Dec. & Am. Dig. tit. Mechanic's Liens, §197. Maturity of claim, see §94. Evidence to show right, see §256. Transfer of property, see §§ 94-109.

² *Atkins v. Little*, 17 Minn. 342; *Cogel v. Mickow*, 11 Minn. 475; *Dolittle v. Plenz*, 16 Neb. 153, 20 N. W. 116; *Lee v. Cook*, 2 Wyo. 312.

³ *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912.

lien.⁴ If the lien extends to all a part cannot be sold or transferred free from the lien,⁵ and when the lien right once attaches, the mechanic is not bound to search the records to ascertain if there has been any change of title.⁶ In order for the conveyance to give to the purchaser priority, the deed must be such a one as is entitled to record, if not, it will not give constructive notice.⁷ But a deed that is absolute, even if it is intended as a mortgage, is sufficient to give constructive notice that the holder has some lien.⁸ An assignee for the benefit of creditors stands in the shoes of his assignor; the assignment not being a conveyance that will give a superior claim.⁹ The claims of mechanics are superior to those of general creditors in the fund arising from the sale of the property by the assignee.¹⁰

⁴ *Hooker v. McGlone*, 42 Conn. 95. A hotel company was incorporated with 1,000 shares of stock, of which B. owned 998. B. contracted with the company to furnish some land, and build a hotel thereon, and turn it over to the company when completed, he to receive \$100,000 in bonds and the same amount in capital stock. When the hotel was partly built, B. failed. He had conveyed the lot to one W., and also delivered to him \$50,000 of the bonds of the company to secure a debt. B. afterwards made a deed of the lot to the hotel company. The secretary of the hotel company procured a deed of the lot from W., and bought the bonds from him, giving his note for \$2,500, in payment. The hotel company acquired no such interest in the land as to defeat liens for the

construction of the hotel. *Houston v. Long*, 15 Ky. L. 74, 23 S. W. 586. An absolute conveyance is an incumbrance in the fullest sense of the term. *Warden v. Sabins*, 36 Kan. 165, 12 Pac. 522.

⁵ *Collins v. Patch*, 156 Mass. 317, 31 N. E. 295; *Dunklee v. Crane*, 103 Mass. 470.

⁶ *McAdow v. Sturtevant*, 41 Mo. App. 220.

⁷ *Lemmer v. Morrison*, 89 Hun (N. Y.) 277, 35 N. Y. Supp. 623, 2 N. Y. Ann. Cas. 240.

⁸ *Livesey v. Brown*, 35 Neb. 111, 52 N. W. 838.

⁹ *Williams v. Miller*, 2 Ohio Dec. 119, 1 West. L. Mo. (Ohio) 409; *Crump v. Gill*, 9 Phila. 117, 30 Leg. Int. (Pa.) 116.

¹⁰ *Pullis Bros. Iron Co. v. Natchitoches*, 51 La. Ann. 1377, 26 So. 402; *Reading Hardware Co. v. New York*, 27 Misc. (N. Y.) 448, 59 N. Y. Supp. 253.

§ 150. Priority affected by conveyance during progress of work.—The fact that the work is in progress,¹ is a notice to all of the rights of the mechanic, and all conveyances made during that time are made subject to the mechanic's rights.² It is immaterial whether the sale was fraudulent³ or bona fide, the property is subject to the lien that may thereafter be perfected within the time limited by statute.⁴ Under some statutes the mechanic's lien has been allowed priority, where the purchaser's title was defective, even though it was filed after the time limit.⁵ Under the Massachusetts statute, the fact that the contract for the work and material has been made, is sufficient to fix the lien right and the purchaser takes subject to the lien.⁶ Under some statutes, conveyances are subject to liens if the materials actually go into the building.⁷ If the contractor acts as an agent of the purchaser, this will not affect innocent subcontractors under him.⁸ Where the deed states that the purchaser takes the property subject to all liens, the purchaser is under the same liability as the vendor.⁹ Where the statute requires the contract to be re-

¹ *Soule v. Dawes*, 7 Cal. 575; *Austin v. Wohler*, 5 Ill. App. 300.

² *Arkansas*.—*White v. Chaffin*, 32 Ark. 59.

Indiana.—*Fleming v. Bumgarner*, 29 Ind. 424.

Massachusetts.—*D. L. Billings Co. v. Brand*, 187 Mass. 417, 73 N. E. 637; *Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110.

Missouri.—*Hammond v. Darlington*, 109 Mo. App. 333, 84 S. W. 446.

New Jersey.—*Bates Mach. Co. v. Trenton, &c., R. Co.*, 70 N. J. L. 684, 58 Atl. 935; *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273.

New York.—*Sinclair v. Fitch*, 3 E. D. Smith (N. Y.) 677.

³ *Jefferson v. Hopson Bros.*, 27 Ky. L. 140, 84 S. W. 540.

⁴ *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

⁵ *Floete v. Brown*, 104 Iowa 154, 73 N. W. 483.

⁶ *Buck v. Hall*, 170 Mass. 419, 49 N. E. 658; *Gale v. Blaikie*, 126 Mass. 274.

⁷ *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884.

⁸ *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

⁹ *Eggert & Flater v. Snoko*, 122 Iowa 582, 98 N. W. 372; *Howes v. Reliance Wire-Works Co.*, 46 Minn. 44, 48 N. W. 448; *Crombie v. Rosenstock*, 19 Abb. N. Cas. (N. Y.) 312.

corded, and the conveyance is made after labor has begun, a contractor in ignorance thereof will not lose his lien.¹⁰ Of course, if the contracting party has no such ownership as will make it lienable,¹¹ a sale thereafter will not be subject to the lien.¹² The filing of a deed,¹³ or notice of a lien or contract,¹⁴ is constructive notice and all purchasers take subject thereto.¹⁵ To have effect, however, as constructive notice, the filing must be such a filing as the law permits;¹⁶ if not filed within the time limit, it will not be effective.¹⁷ A person buying with notice of a decree foreclosing a lien, will take it subject to the same.¹⁸ If a purchaser agrees to the lien, then the mechanic may compel him to pay the same in a proper action therefor.¹⁹

§ 151. **Priority—Liens and incumbrances.**—In the previous section we have seen that a conveyance is treated as an incumbrance, and it may be said generally that liens and incumbrances stand upon the same ground as conveyances,¹ and the lien of a mechanic does not overreach such prior liens.² The law in force at the time the obligation becomes

¹⁰ *Baxter Lumber Co. v. Nickell*, 24 Tex. Civ. App. 519, 60 S. W. 450. But see *Beehler v. Ijams*, 72 Md. 193, 19 Atl. 646. In re *Gable*, 59 Md. 455.

¹¹ *Lippman v. Low*, 69 App. Div. (N. Y.) 24, 74 N. Y. Supp. 516.

¹² *Married women. Smith v. Gauby*, 43 Fla. 142, 30 So. 683.

¹³ *Mouat v. Fisher*, 104 Mich. 262, 62 N. W. 338.

¹⁴ *Slingerland v. Lindsley*, 1 N. J. L. J. 115.

¹⁵ *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84; *Burdick v. Moulton*, 53 Iowa, 761, 6 N. W. 48.

¹⁶ *Shepherd v. Leeds*, 12 La. Ann. 1.

¹⁷ *Von Tobel v. Ostrander*, 158 Ill. 499, 42 N. E. 152.

¹⁸ *Frank v. Jenkins*, 11 Wash. 611, 40 Pac. 220.

¹⁹ *Cullers v. First Nat. Bank*, (Tex. Civ. App.) 29 S. W. 72.

¹ See §§ 149, 150. See Dec. & Am. Dig. tit. Mechanics' Liens, § 198.

² *Shaeffer v. Weed*, 8 Ill. 511; *Homans v. Coombe*, (3 Cranch (C. C.) 365), Fed. Cas. No. 6,654. Under some statutes, the liens of the mechanic on the building are prior to previous existing liens on the land. *Cooper Mfg. Co. v. Delahunt*, 36 Ore. 402, 60 Pac. 1.

fixed, controls in determining the priority of liens.³ And a negligent claimant, failing to follow the statute will lose his right of priority to others who are more diligent and possess an equal or stronger equity.⁴ Where a person furnishes personal property that may become a fixture he is bound to know that fact and cannot be heard to complain if it loses its identity and is applied to the payment of a previous lien or incumbrance.⁵ It is a well settled proposition that the mechanic's lien cannot have priority over valid liens existing on the property before the mechanic's lien has attached.⁶ And the building or structure, made through the efforts of a mechanic, as a general rule will become absorbed by the real estate and lose its separate identity and become with the real estate subject to a prior lien existing on the real estate.⁷ Of course, where the statute allows a lien on the building alone, and the building can be removed, the mechanic's lien on the building will have priority, and the lien on the land will remain as it was when the building was erected.⁸ All liens attaching to the real estate after the right to a mechanic's lien becomes fixed are subject to such prior mechanic's lien.⁹ In order, however, that a mechanic's lien may

³ *Bradley & Currier Co. v. Ward*, 162 N. Y. 618, 57 N. E. 1105.

⁴ *Perry v. Parrott*, 135 Cal. 238, 67 Pac. 144.

⁵ *June &c. Co. v. Doke*, 35 Tex. Civ. App. 240, 80 S. W. 402.

⁶ *Georgia*.—*National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546.

Indiana.—*Close v. Hunt*, 8 Blackf. (Ind.) 254.

Maryland.—*McKim v. Mason*, 3 Md. Ch. 186; *Jones v. Hancock*, 1 Md. Ch. 187.

Rhode Island.—*Blackmar v. Sharp*, 23 R. I. 412, 50 Atl. 852.

Federal.—*Homans v. Coombe*,

3 Cranch, C. C. 365, Fed. Cas. No. 6,654.

⁷ *Fletcher v. Kelly*, 88 Iowa 475, 476, 55 N. W. 475, 21 L. R. A. 347n.

⁸ *Otley v. Haviland*, 36 Miss. 19.

⁹ *Arkansas*.—*White v. Chaffin*, 32 Ark. 59.

Florida.—*Bond Lumber Co. v. Masland*, 45 Fla. 188, 34 So. 254.

Indiana.—*Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

Kentucky.—*Caldwell Institute v. Young*, 63 Ky. 582.

Maryland.—*Wells v. Canton Co.*, 3 Md. 234; *Jones v. Hancock*, 1 Md. Ch. 187.

be entitled to priority, the statute relating to the perfecting of the lien must have been complied with.¹⁰ And the claim of a mechanic must be of such a character that it comes within the statute giving such claims priority.¹¹

§ 152. **Priority—Dower, curtesy, taxes.**—The right of dower and curtesy is superior to the lien of a mechanic, for materials or labor placed upon the property under contract with the person owning the fee.¹ But in order to have this effect, the dower or curtesy right, although in inchoate form, must exist at the time the lien attaches; if the two rights are coeval in time, the mechanic's lien will prevail.² And if the owner of such dower, or curtesy right shall sell the same, the purchaser will get it free from the lien of the mechanic.³ Unless there is a stipulation in the lease that the landlord shall have a lien for his rent,⁴ or for any advances made by him,⁵

Mississippi.—*Ivey v. White*, 50 Miss. 142.

Missouri.—*Dubois v. Wilson*, 21 Mo. 213.

New Jersey.—*Tompkins v. Horton*, 25 N. J. Eq. 284.

New York.—*Livingston v. Miller*, 16 Abb. Pr. (N. Y.) 371.

Wisconsin.—*Hall v. Hinckley*, 32 Wis. 362.

¹⁰ *Curtis v. Broadwell*, 66 Iowa 662, 24 N. W. 265; *Kendall v. McFarland*, 4 Ore. 292; *Hall v. Hinckley*, 32 Wis. 362.

¹¹ The claim for money advanced to the owner to erect the building is not superior to the claim of the mechanic. *Hickox v. Greenwood*, 94 Ill. 266.

¹ **Illinois.**—*Gove v. Cather*, 23 Ill. 585, 76 Am. Dec. 711; *Shaeffer v. Weed*, 8 Ill. 511.

Indiana.—*Bishop v. Boyle*, 9

Ind. 169, 68 Am. Dec. 615; *Pifer v. Ward*, 8 Blackf. (Ind.) 252.

Virginia.—*Iaeger v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

² *Nazareth Literary & Benevolent Inst. v. Lowe*, 1 B. Mon. (Ky.) 257.

³ A wife, her husband joining with her, may mortgage her inchoate interest in her husband's real estate to secure his debt, and such mortgage will have priority, as to such inchoate interest, over the liens of mechanics or other persons for the erection or repair of buildings on such real estate, at the husband's request. *Mark v. Murphy*, 76 Ind. 535. The same rules apply to curtesy as to dower. *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280.

⁴ *Young v. West Side Hotel Co.*, 9 Ohio Cir. Ct. 127, 2 Ohio Cir. Dec. 140.

his lien for rent is not superior to the mechanic furnishing material or making improvements,⁶ the mechanic in such cases being bound to inform himself of the conditions of the lease.⁷ Taxes are, as a general rule, superior and entitled to payment prior to a mechanic's lien.⁸

§ 153. **Priority—Debts of decedents, buildings and improvements.**—The property of deceased persons are liable for the debts of the decedent in the order in which they become a lien during the lifetime of such decedent.⁹ A person subsequently deceased can not create a lien otherwise than as the law provides to affect the lien of a mechanic after his death.¹⁰ Some statutes draw a line between buildings and improvements.¹¹ And if a lien is al-

⁵ *Lenderking v. Rosenthal*, 63 Md. 28; *Mills v. Matthews*, 7 Md. 315.

⁶ *National Lumber Co. v. Bowman*, 77 Iowa 706, 42 N. W. 557; *Wood's Appeal*, 30 Pa. St. 274.

⁷ *Mills v. Matthews*, 7 Md. 315.

⁸ *Pennock v. Hoover*, 5 Rawle (Pa.) 291.

⁹ *Boynton v. Westbrook*, 74 Ga. 68. Superior to widow's claim for money held by decedent in trust. *Rietz v. Coyer*, 83 Ill. 28.

¹⁰ *Frost v. Ilsley*, 54 Me. 345. Under an old statute it was held that a lien could not be perfected after the death of the owner. *Hoff's Appeal*, 102 Pa. 218. Under the Ohio statute where the owner dies the contractor may proceed to finish the work, and in such cases his lien is prior to the liens of creditors of heirs and devisees. *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228.

¹¹ "The words 'building' and 'improvement' are not synonymous in Code, Ala. § 3019, declaring that mechanic's liens as to the land shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement. It shall have priority over all liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work or subsequently created. The term 'building' refers to an independent erection upon the land. An improvement may be an independent structure or addition, and it may be an addition to or mere betterment of a building or improvement already made, and not included in repairs thereto." *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; *Kennedy v. Haddow*, 19 Ont. 240.

lowed on the building separate from the land, a prior lien on the land will not be prior to the lien on the building,¹² if the building can be removed without permanent injury to the land.¹³ In the case of a leasehold interest the mechanic's lien covers no greater right than the lessee has.¹⁴

§ 154. **Priority—Judgments, attachments, executions.**—A judgment lien takes effect at the time fixed by statute, and if the right to a mechanic's lien becomes fixed after that time, it will as a matter of course be subordinate to the judgment.¹ If the judgment becomes a lien during the period within which a mechanic can perfect his right, it will not be superior to the right of the mechanic.² And if a mechanic does not pursue the remedy allowed him by the law relating

¹² *McAllister v. Clopton*, 51 Miss. 257; *Ivey v. White*, 50 Miss. 142.

¹³ *Conrad v. Starr*, 50 Iowa 470. Lien on additions, etc. *Whitenack v. Noe*, 3 Stockt. N. J. Eq. 321. If the building is erected on two lots, one of which cannot be made subject to the lien, it will attach to the other lot. *Crooker v. Grant*, 5 Tex. Civ. App. 182, 24 S. W. 689. Where the holder of a mechanic's lien, which is a prior lien on the improvement by a subsequent lien on the land, recovers a judgment in a proceeding against both the land, and the improvement, he loses his right of priority. *State ex rel. John J. Ganahl Lumber Co. v. Drew*, 43 Mo. App. 362.

¹⁴ *Gaskill v. Moore*, 4 Cal. 233.

¹ *Arkansas*. — *McCullough v. Caldwell*, 8 Ark. 231.

Missouri.—*Page v. Bettes*, 17 Mo. App. 366.

New York.—*Payne v. Wilson*, 74 N. Y. 348.

Ohio.—*Choteau v. Thompson*, 2 Ohio St. 114.

Pennsylvania.—*In re Vandevender*, 2 Browne (Pa.) 304; *Shapnack v. Wilson*, 1 Jour. Juris. (Pa.) 93; *Boll v. Boll*, 11 York (Pa.) 20. Where land was conveyed by a deed which was not recorded, and was subsequently sold under a mechanic's lien against a grantee, a creditor of the original grantor, who secured a judgment after the sale under the lien, could not enforce his judgment against the land in the hands of the purchaser at the lien sale. *Pace v. Moorman*, 99 Va. 246, 37 S. E. 911, 3 Va. Sup. Ct. Rep. 145. See Dec. & Am. Dig. tit. Mechanics' Liens, § 200.

² *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544; *In re Bitner's Estate*, 176 Pa. 90, 34 Atl. 957; *Nolt v. Crow*, 22 Pa. Super Ct.

to mechanics' liens, but seeks a personal judgment, then his judgment will rank in matter of priority, the same as other judgments rendered on a personal claim.³ Of course the person against whom the lien is sought to be enforced must have had an interest in the property at the time at which it is claimed the lien attached to the property.⁴ So attachments and executions against the owner must be levied on the property before the right to a mechanic's lien attaches, in order to be superior thereto.⁵ Here, as elsewhere, however, a mechanic or material man must have brought himself by the nature and character of the materials furnished and the perfection of his lien, within the statute, or he will have no priority.⁶ If he does not do so, the mere fact that he has furnished material or given labor, will give him no right to a prior lien over other creditors on the fund arising from the sale of the property.⁷ If a debt is due from a contractor or other person standing in that relation, and the statute does not require the owner to hold the same after notice from the subcontractor or otherwise, an attachment of the same by a general creditor will be prior to a claim the subcontractor might have had thereon.⁸ The notice usually determines the subcontractor's

113; *In re Vandevender*, 2 Browne, (Pa.) 304.

³ *Love v. Cox*, 68 Ga. 269; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq. 150. Judgment roll and execution as evidence. *Johnson v. Puritan Mining & Milling Co.*, 19 Mont. 30, 47 Pac. 337. As to what is after acquired. Judgment, §—. *Pace v. Moorman*, 99 Va. 246, 37 S. E. 911, 3 Va. Sup. Ct. Rep. 145.

⁴ *Seltzer v. Robbins*, 181 Pa. St. 451, 37 Atl. 567.

⁵ *Young v. Stoutz*, 74 Ala. 574; *McCullough v. Caldwell*, 5 Ark.

237; *First Nat. Bank v. Redman*, 57 Me. 405. See Dec. & Am. Dig. tit. Mechanics' Liens, § 201.

⁶ *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25, 65 N. W. 1017. If the statute gives no lien there can be none, although the forms are gone through with. *Greenough v. Nichols*, 30 Vt. 768.

⁷ Doubted whether equitable principles will apply. *Quimby v. Sloan*, 2 E. D. Smith (N. Y.) 594; *Alexander v. Hemrich*, 4 Wash. St. 727, 31 Pac. 21.

⁸ *Cahoon v. Levy*, 6 Cal. 295, 65

right to priority.⁹ It seems that mere knowledge alone that there are mechanics' liens will not affect the right of priority. It must be such knowledge that the law requires a duty, therefrom, and that it would be inequitable and a fraud upon the rights of others to allow the claimants priority.¹⁰

§ 155. **Priority—Mortgages.**—The matter of priority between mortgages and mechanic's liens is very similar to that of conveyances,¹ and liens and other incumbrances.² As a general rule, all mortgage liens existing before the right to a mechanic's lien comes into existence—having been perfected as the law requires—are prior to the mechanic's lien and mortgages subsequent thereto yield priority to the lien of a mechanic.³ The mere right to the mechanic's lien, however, does not give such priority unless it has been perfected in the way the statute provides. The mere fact that the materials had been furnished is not sufficient to induce a court of equity to give priority where the statute has not been followed.⁴ But while these questions of priority are determined largely by statutory provisions, wherever possible equitable principles are applied, thus a deed, absolute on its face, if in reality a mortgage will be so considered and to the extent of

Am. Dec. 515. See §§ 56, 66. Three hours after. *Bell v. Burke*, 89 Ga. 772, 15 S. E. 705.

⁹ *Alabama*.—*Conboy v. Fricke*, 50 Ala. 414.

California.—*Long Beach School Dist. v. Lutge*, 129 Cal. 409, 62 Pac. 36; *Cahoon v. Levy*, 6 Cal. 295, 65 Am. Dec. 515. Taking insufficient security does not affect mechanic's claim or right to a lien, etc. *Norton's Assignee v. Hope Milling, Mining & Lumber Co.*, 101 Ky. 223, 40 S. W. 688.

Nebraska.—*Jones v. Church of the Holy Trinity*, 15 Neb. 81, 17 N. W. 362.

Ohio.—*Lane v. Thomas*, 25 Ohio Cir. Ct. 303.

Wisconsin.—*Dorestan v. Krieg*, 66 Wis. 604, 29 N. W. 576.

¹⁰ *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25, 65 N. W. 1017.

¹ See §§ 149, 150.

² See §§ 151, 152, 153.

³ *Erwin v. Acker*, 126 Ind. 133, 25 N. E. 888. See §§ 156, 157, 158, 159.

⁴ *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. 372. See § 2.

the mortgage debt, will be prior to a subsequent lien.⁵ And likewise if a prior mortgage is renewed after the lien has attached, it being the same debt, the renewal will not cause it to lose its priority.⁶ It would be different, however, if the old debt was lifted and the new one made, although the new included the old.⁷ So the priority is lost by an interval, even if made by consent of mortgagor and mortgagee, between the lifting of the old debt and the making of the new one.⁸ The fact that the value of the mortgage security has been enhanced by the labor or material of a mechanic, will not affect the priority of the mortgage.⁹ There might be an exception to the latter statement in cases where the statute preserves the lien on the building, separate and apart from the land upon which it is located.¹⁰ The fact that the money secured by the mortgage was gotten under the express directions of the owner that it was to be used in improving the property, will

⁵ *Hudson v. Barham*, 101 Va. 63, 43 S. E. 189; *Edler v. Clark*, 51 Fed. 117.

⁶ *Title Guarantee & Trust Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271.

⁷ *Easton v. Brown*, 170 Mass. 311, 49 N. E. 433.

⁸ *Frost v. Clark*, 82 Iowa 298, 48 N. W. 82; *Chicago Lumber Co. v. Anderson*, 51 Neb. 159, 70 N. W. 919. See *Hoskins v. Carter*, 66 Iowa 638, 24 N. W. 249 as to priority where lien is filed after time limit. Under Comp. L. N. D., § 5476, providing that the claimant of a mechanic's lien may file a statement of his account within 90 days after completion of the work, and that a failure to file the same within that time shall not defeat the lien "except against purchasers or incumbrancers, in good faith without notice, whose rights accrued

after the 90 days, and before any claim for the lien was filed." A lien, the account and claim for which were filed more than 90 days after completion of the work is superior to a mortgage made and filed within such 90 days. *Wisconsin Trust Co. v. Robinson & Cary Co.*, 68 Fed. 778, 15 C. C. A. 668, 32 U. S. App. 435.

⁹ *Monticello Bank v. Sweet*, 64 Ark. 502, 43 S. W. 500; *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266; *Thorpe Block Saving & Loan Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978.

¹⁰ *Christian-Craft Grocery Co. v. Kling*, 121 Ala. 292, 25 So. 629; *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157; *Thorpe Block Saving & Loan Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978; *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

not disturb prior mortgage liens.¹¹ Likewise the fact that the mortgagor fraudulently represented to the mortgagee, that there were no mechanic's liens against the property, will not affect the lien of a mechanic if such lien actually existed at that time.¹² Again, applying equity principles, if a mortgage is made bona fide,¹³ it is held not to lose its priority merely because of an omission of some technical matter in its execution.¹⁴ And on like principles a mechanic's lien will not lose its priority by reason of some technical deviation in the matter of execution.¹⁵ Where a chattel mortgage is given on personal property which afterwards becomes a fixture and a part of the real estate, a mechanic's lien attaching to the real estate will have priority over the chattel mortgage.¹⁶ An heir takes property from an ancestor, subject to whatever liens could have been asserted against the ancestor at the time of his death.¹⁷ Where a general scheme was formed to issue bonds and out of the proceeds pay the mechanics, it was held that the mechanics would not lose their priority unless it was shown that they had waived their rights.¹⁸ In foreclosure proceedings, only such persons will be precluded

¹¹ *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616.

¹² The validity of liens does not depend upon the motives which suggested their being filed. *Gordon v. Torrey*, 2 McCart N. J. Eq. 112, 82 Am. Dec. 273.

¹³ Where the land is not in adverse possession. *Boggs v. McEwen*, 69 Neb. 705, 96 N. W. 666. A fictitious mortgage can have no priority over a mechanic's lien. *Thomas v. Davis*, 3 Phila. (Pa.) 171.

¹⁴ *Payne v. Wilson*, 74 N. Y.

348; *Sill v. Wright*, 21 Pittsb. Leg. J. (Pa.) (O. S.) 190.

¹⁵ *Blanshard v. Schwartz*, 7 Okla. 23, 54 Pac. 303.

¹⁶ *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174. The lien of a mechanic upon a machine placed in a manufactory, subject to a mortgage executed before the machine was begun to be set up, is subsequent, and must yield to the mortgage lien.

¹⁷ *Green v. Brown*, 146 Ind. 1, 44 N. E. 805.

¹⁸ *Montgomery v. Allen*, 107 Ky. 298, 21 Ky. L. 1001, 53 S. W. 813.

from thereafter asserting their rights as have been made parties.¹⁹

§ 156. **Priority—Mortgages given before making contract or commencement of work.**—Where the statute makes provision for recording the contract it has been held that a mortgage made before the contract is recorded will be prior to the mechanic's lien thereunder.¹ Where the statutes fix the time when the lien right shall attach, as when the building is commenced,² or the materials are furnished,³ or the claim is filed,⁴ or at the time of "laying in of stock," that fact will fix the date which will determine the question of priority between the mortgage and the mechanic's lien,⁵ and a mortgage given before such date, will be prior to a lien thereafter.⁶

¹⁹ *Gaines v. Childers*, 38 Ore. 200, 63 Pac. 487. In embarrassed circumstances. *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 624.

Period of ascertainment of value.—Where on a reference in a mechanic's lien proceeding, it is found as between a lienholder and a prior mortgagee, that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lienholder, who under s. s. 3 of § 5 of the Mechanics' Lien Act, is declared entitled on account of such increased value to priority over the mortgage, and pending the proceedings the premises are destroyed by fire, the claim of the lienholder is at end so far as the interests of the mortgagee are affected by it. *Patrick v. Walbourne*, 27 Ont. 221.

¹ *Morse v. Dole*, 73 Me. 351.

² *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273; *Lee v. Hoyt*, 101 Iowa 101, 70 N. W. 95. See § 130 as to what constitutes commencement.

³ See § 130. *Zehner v. Johnston*, 22 Ind. App. 452, 53 N. E. 1080; *Grand Island Banking Co. v. Koehler*, 57 Neb. 649, 78 N. W. 265; *Cushwa v. Improvement, Loan & Building Assn.*, 45 W. Va. 490, 32 S. E. 259.

✓ **Materials are not furnished, until delivered on the ground.** If ready and stored somewhere else, until the building is ready for them, the date of their delivery will be the time when the right to a lien attaches. *Bradley v. Stafford*, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 138.

⁴ See § 100. *Hinckley & Egery Iron Co. v. James*, 51 Vt. 240.

⁵ *Knox v. Starks*, 4 Minn. 20.

⁶ *Ferguson v. Miller*, 6 Cal.

And this would be true even though the labor of a mechanic added largely to the security of the mortgage.⁷ Under some statutes especially where the improvements can be removed without injury to the land,⁸ the mechanic may be protected as to the increased value as against a prior mortgage.⁹ Mechanics dealing with persons are bound to inform themselves as to what interests the contracting owner may have in the land upon which the structure is to be placed, and cannot complain of a mortgage which is properly recorded.¹⁰ And as a general rule it may be said that the question of the priority of a mortgage rests upon the fact that it was filed before the mechanic's lien right has become such as entitles it to be classed as a lien on the property.¹¹ Furthermore the parties are bound by the statements contained in the lien or mortgage as to the time when the same was executed or the lien attached.¹²

§ 157. Priority—Mortgage given after making of contract or commencement of work.—If the statute makes the lien attach at the time the contract is entered into, as a matter of course, a mortgage given thereafter will be subject to the lien of a mechanic.¹ Where, however, the contract is subsequently

402; *Martsoff v. Barnwell*, 15 Kan. 612; *Leib v. Bean*, 1 Ashm. (Pa.) 207; *Wright v. Vaughan* (Va.), 33 S. E. 595. Foreclosed before materials furnished. *Shepardson v. Johnson*, 60 Iowa 239, 14 N. W. 302. Mere contemplation of making improvements before mortgage is executed does not make lien prior to mortgage. *Sullivan v. Texas Briquette & Coal Co.*, 94 Tex. 541, 63 S. W. 307.

⁷ *Equitable Life Ins. Co. v. Slye*, 45 Iowa 615; *Dugan v. Scott*, 37 Mo. App. 663.

⁸ *O'Brien v. Pettis*, 42 Iowa 293. See § 162.

⁹ *Fidelity Loan & Trust Co. v. Dennis*, 93 Va. 504, 25 S. E. 546.

¹⁰ *Interstate Building & Loan Assn. v. Ayers*, 177 Ill. 9, 52 N. E. 342; *Holmes v. Ferguson*, 1 Ore. 220; *Pride v. Viles*, 35 Tenn. 125; *Reid v. Bank of Tennessee*, 33 Tenn. 262.

¹¹ *Ortonville v. Geer*, 93 Minn. 501, 101 N. W. 963; *Jessup v. Stone*, 13 Wis. 521.

¹² *Hartford Building & Loan Assn. v. Goldreyer*, 71 Conn. 95, 41 Atl. 650; *Landau v. Cottrill*, 159 Mo. 308, 60 S. W. 64.

¹ *Illinois*.—*Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182.

changed, the lien will only be prior as to the amount required under the original contract.² Where a prior unrecorded mortgage is released, and a new one taken, a mechanic's lien under a contract made prior to the date of the new mortgage will take priority over the mortgage.³ A person taking a mortgage on real estate is bound by the appearance of the

Maine.—*Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553; *Morse v. Dole*, 73 Me. 351.

Massachusetts. — *McDowell v. Rockwood*, 182 Mass. 150, 65 N. E. 65; *Carew v. Stubbs*, 155 Mass. 549, 30 N. E. 219; *Batchelder v. Rand*, 117 Mass. 176; *Dunklee v. Crane*, 103 Mass. 470. Work was under way also. *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65 S. W. 318.

Existing contract. — Where a property owner stated to a lumber company that he desired to purchase lumber for a house on certain premises, and the company agreed to sell such lumber when he should desire the same, to be paid for at market prices, made an estimate as to the probable cost of the lumber, and under this agreement delivered enough lumber to complete the lower floor, sills, and studding three days before the owner of the property executed a mortgage thereon, there was an existing contract for the purchase of lumber, establishing a mechanic's lien superior to the mortgage, providing that a mechanic's lien shall be superior to a mortgage when the contract under which the lien is claimed is entered into

prior to the execution of the mortgage. *Taylor v. Springfield Lumber Co.*, 180 Mass. 3, 61 N. E. 217. See *Ellenwood v. Burgess*, 144 Mass. 534, 11 N. E. 755, where although there was fraud, the lien was not prior because the contract was in force when mortgage was given.

² *Osborne v. Barnes*, 179 Mass. 597, 61 N. E. 276; *Collum v. Pennsylvania Paint & Ochre Co.*, 185 Pa. St. 411, 39 Atl. 1009; *Martin v. Texas Briquette & Coal Co.*, (Tex. Civ. App.) 77 S. W. 651. Provision in a contract for furnishing the labor and material mentioned in Schedule F., for a building, that any lien "filed under this contract" for labor and material mentioned in such schedule shall be subject to a mortgage, does not affect a lien for labor and material not included therein. *Sankey v. Burton*, 196 Pa. St. 504, 46 Atl. 850; *Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177.

³ Under the Massachusetts Statute, the mortgage must be made and recorded before the contract is made in order to be prior to the lien. *Dixon v. Hyndman*, 177 Mass. 506, 59 N. E. 73.

Lien on building.— Under the express provision of *Mills' Ann. St. Colo.* §§ 2384, 2385, deeds of

same, and if the indications are such that an ordinarily prudent man could ascertain from the same by the exercise of ordinary care that the right to a mechanic's lien has attached, the mortgage taken by him will be subject to the right of the mechanic.⁴ Of course in order for the mechanic to have his priority, he must have proceeded according to law in perfecting his lien,⁵ and if he does so his lien will have priority for all materials furnished and labor done, whether before or after execution of the mortgage.⁶ The fact that a mortgage loan was negotiated before a lien right attached, will not give the

trust recorded before the execution of a building contract have priority of lien on the land over mechanics' liens, but are subordinated, in the absence of special circumstances, to the mechanics' liens on the building. *Jorlman v. McPhee*, 31 Colo. 26, 71 Pac. 419.

⁴ *Illinois*.—*Interstate Building & Loan Assn. v. Ayers*, 71 Ill. App. 529.

Massachusetts.—*Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

Minnesota.—*Miller v. Stoddard*, 54 Minn. 487.

Nebraska.—*Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 315; *Henry v. Coatsworth Co. v. Fisherdict*, 37 Neb. 207.

North Dakota.—*Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340.

Rhode Island.—*McDonald v. Kelly*, 14 R. I. 335. Process of erection. *Cheshire Provident Inst. v. Stone*, 52 N. H. 365. Commencement of building. *Hahn's Appeal*, 39 Pa. 409. Digging cellar, commencement. *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352.

⁵ *Iowa*.—*Iowa Mortgage Co. v. Shanquest*, 70 Iowa 124, 29 N. W. 820; *Lamb v. Hanneman*, 40 Iowa 41.

Montana.—*Johnson v. Puritan Mining & Milling Co.*, 19 Mont. 30, 47 Pac. 337; *Murray v. Swanson*, 18 Mont. 533, 46 Pac. 441.

Texas.—*Schultze v. Alamo Ice & Brewing Co.*, 2 Tex. Civ. App. 236, 21 S. W. 160.

⁶ *Michigan*.—*Kay v. Townsley*, 113 Mich. 281, 71 N. W. 490.

Minnesota.—*Ortonville v. Geer*, 93 Minn. 501, 101 N. W. 963; *Glass v. Freeberg*, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335; *Milner v. Norris*, 13 Minn. 455.

Nebraska.—*Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 779; *Henry & Coatsworth Co. v. Fisherdict*, 37 Neb. 207, 55 N. W. 643.

Ohio.—*Woodman v. Richardson*, 1 Ohio Cir. Ct. 191, 1 Ohio Cir. Dec. 104.

Oregon.—*Harrisburg Lumber Co. v. Washburn*, 29 Ore. 150, 44 Pac. 390.

Utah.—*Fields v. Daisy Gold Min. Co.* 25 Utah 76, 69 Pac. 528.

mortgage priority if the mortgage was executed after the lien right had attached.⁷ Neither the fact that the money obtained on the mortgage was used to pay a previous mortgage,⁸ or was used in paying for materials or work on the building will give it priority.⁹

§ 158. **Priority—Mortgage after commencement of work, or before material furnished.**—As before stated, if the work is commenced,¹ or the building begun,² or the furnishing of materials begun,³ or the contract made,—where that fixes the

Federal—*Courtney v. Insurance Co. of North America*, 49 Fed. 309, 1 C. C. A. 249, 4 U. S. App. 140.

Continuous contract.—Where the erection of a building is one continuous undertaking, with nothing to suggest an abandonment of the work at any time, a mortgage or other incumbrance or distinct lien, originating subsequent to the commencement of the work upon the ground, or the furnishing of materials at the same place, whether by one general contractor or by independent contractors, must be postponed and subordinated to the lien claims of all who have contributed to the completion of the structure by their labor or materials. Under some statutes the mortgagor is only bound by express or constructive notice as by filing claim, etc. *Gere v. Cushing*, 68 Ky. 304.

⁷ *Nixon v. Cydon Lodge*, 56 Kan. 298, 43 Pac. 236.

⁸ *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

⁹ *Sullivan v. Texas Briquette & Coal Co.*, 94 Tex. 541, 60 S. W.

330. Where defendant advanced money to the owner of a building, and took a mortgage thereon while a contractor was erecting it, he was affected with notice of the contractor's lien, and the contractor was not estopped by taking from the owner notes for the amount thereof secured by mortgage on the building. *Farmers & Mechanics' Nat. Bank v. Taylor*, 91 Tex. 78, 40 S. W. 876, 966.

¹ See § 18. *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Davis v. Billalund*, 18 Wall (U. S.) 659, 21 L. ed. 969; *In re Hoyt*, 3 Biss. (U. S.) 436, 12 Fed. Cas. 6,805.

² **Arkansas.**—See § 119. *Apperson v. Farrell*, 56 Ark. 640, 20 S. W. 514.

Iowa.—*Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177; *Neilson v. Iowa Eastern R. Co.*, 44 Iowa 71.

Kansas.—*Keystone Iron Works Co. v. Douglass Sugar Co.*, 55 Kan. 195, 40 Pac. 273; *Thomas v. Mowers*, 27 Kan. 265.

³ *Milner v. Norris*, 13 Minn. 455; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680.

date,⁴ even though the materials are not furnished, nor the work begun, for which a lien is claimed until after the execution and recording of the mortgage,—the lien of the mechanic will still have its priority.⁵ And this is true although a great hardship is imposed on the mortgagee as the language of the statute must be followed, and parties are bound to know the law.⁶ Where the work is not a continuous piece of work, each part may be considered as being performed under a new contract, and will be governed by that fact.⁷ If the old contract is at an end and a new one created, that fact will control.⁸ Under some statutes, it is held that each claimant is governed by the time that he commenced his particular part of the work and that as to him, the time when the general work was commenced will not avail as determining his priority.⁹ Under other statutes the delivery of materials determines the material man's date of priority and under still other statutes the priority dates from the time that a notice is given.¹⁰ The claimant must follow the statutory requirement or he will lose his right of preference.¹¹ Under a statute that made the lien date from the "commencement of the building" the lien for fixtures put in the building after the mortgage was given was held to be prior to such mortgage.¹² A slight change

⁴ *Sprague v. McDougall*, 172 Mass. 553, 52 N. E. 1077.

⁵ *Crowell v. Gilmore*, 13 Cal. 54.

⁶ *Haxtun Steam Heater Co. v. Gordon*, 2 N. Dak. 246, 50 N. W. 708, 33 Am. St. 776.

⁷ *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

⁸ *Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680; *In re Thomas' Estate*, 76 Pa. St. 30.

⁹ *Welch v. Porter*, 63 Ala. 225; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073.

¹⁰ *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680; *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. 880.

¹¹ *Smedley v. Conaway*, 5 Clark (Pa.) 417; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364.

¹² *Keystone Iron Works Co. v. Douglass Sugar Co.*, 55 Kan. 195, 40 Pac. 273; *Flint, & Co., Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 455, 38 Pac. 566; *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 65 N.

in the original design, as from heating stoves to a steam-heating apparatus, will not affect the matter of priority.¹³ The mechanic must affirmatively show the facts entitling him to priority, before the same will be allowed.¹⁴ Subcontractors stand in the same position as the principal contractor in relation to the priority of their lien over the mortgage except where courts have held that the lien dates from the time that the person actually performing the labor of furnishing the material, furnishes the same.¹⁵

§ 159. **Priority—Mortgages given before lien attaches.**—Of course if the mortgage is given before the time that the law recognizes that the lien right has attached to the property, it is prior to the lien right of the mechanic.¹ A technical error, such as giving the direction East when it should have

W. 488, 51 Am. St. 925, 30 L. R. A. 778.

¹³Haxtun Steam Heater Co. v. Gordon, 2 N. Dak. 246, 50 N. W. 708, 33 Am. St. 776.

¹⁴Farmers' Loan & Trust Co. v. Cincinnati, etc., R. Co., 10 Ohio Dec. (Re.) 481, 21 Wkly. L. Bull. (Ohio) 275; Safe Deposit & Trust Co. v. Columbia Iron & Steel Co., 176 Pa. St. 536, 35 Atl. 229; Bastien v. Barras, 10 N. Dak. 29, 84 N. W. 559. One claiming a mechanic's lien must allege and show affirmatively that "stock was laid," or work commenced, before the conflicting lien (in this case by mortgage) attached. Farmers' Bank v. Winslow, 3 Minn. 86 [43], 74 Am. Dec. 740. And parol evidence has been held inadmissible to vary date shown on lien. Reynolds v. Miller, 177 Pa. St. 168, 35 Atl. 702.

The purchaser at judicial sale is not bound to look further than the record. Wheelock v. Harding, 4 Pa. Super. Ct. 21. Purchasers at Judicial sales only succeed to the interest that was sold; persons not made parties are not affected. Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413.

¹⁵Succession of Erard, 6 Rob. (La.) 333; Hydraulic Press Brick Co. v. Bormans, 19 Mo. App. 664; Dunavant v. Caldwell, etc., R. Co., 122 N. Car. 999, 29 S. E. 837.

¹Indiana.—Troth v. Hunt, 8 Blackf. (Ind.) 580.

Iowa.—Grosbeck v. Ferguson, 43 Iowa, 532.

Mississippi.—Hoover v. Wheeler, 23 Miss. 314.

Manitoba.—Robock v. Peters, 13 Manitoba 124; Klevell v. Murray, 2 Manitoba 209.

been West, will not defeat the priority of the mortgage,² nor will the fact that the mortgage is given by the legal owner through the request of the equitable owner.³ Conversely, if the lien right has attached before mortgage is given, it is prior thereto.⁴ But as stated in the previous section, equitable principles control, and if a mortgage were given to remedy a defect in a former one, the mortgage will retain its priority.⁵ And where a mortgage is given after a notice of a lien is filed as required by statute,⁷ or proceedings have been instituted to establish a lien, the mortgage will be subject to such lien right.⁸ But where the statutes require a mechanic to file a notice and such filing gives him his right to a lien, a mortgage given before this step is taken will be prior to the lien.⁹ The date of filing the lien is conclusive as to all the parties.¹⁰

²*Grand Opera House Co. v. McGuire*, 14 Mont. 558, 37 Pac. 607.

³*Lunt v. Stephens*, 75 Ill. 507; *Holmes v. Hutchins*, 38 Neb. 601, 57 N. W. 514.

⁴*Louisiana*.—*Succession of Leneil*, 34 La. Ann. 868.

Massachusetts. — *Carew v. Stubbs*, 155 Mass. 549, 30 N. E. 219.

New Hampshire. — *Graton & Knight Mfg. Co. v. Woodworth-Mason Co.*, 69 N. H. 177, 38 Atl. 790.

North Carolina. — *Cheesborough v. Asheville Sanatorium*, 134 N. Car. 245, 46 S. E. 494.

Washington. — *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 69 Pac. 389.

Federal.—*Atkins v. Volmer*, 21 Fed. 697.

⁶ *Payne v. Wilson*, 74 N. Y. 348, See § 155.

⁷ Account is notice to the world. *Spence v. Etter*, 8 Ark. 69.

⁸ *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94.

⁹ *Indiana*.—*Green v. Green*, 16 Ind. 253, 79 Am. Dec. 428.

Louisiana.—*Marmillon v. Archinard*, 24 La. Ann. 610.

New Jersey.—*Vandyne v. Vanness*, 1 Halst. Ch. (N. J. Eq.) 485.

New York.—*Munger v. Curtis*, 42 Hun. (N. Y.) 465. Under former laws the lien came into existence on the filing of a petition. *Mulrey v. Barrow*, 11 Allen (Mass.) 152.

¹⁰ *Reading v. Hopson*, 90 Pa. St. 494.

Fraudulent Mortgage.—Where a mortgage executed to the wife of a contractor by the owners of the building, in payment of the amount due the contractor, and

§ 160. **Priority—Mortgage—Future advances.**—A mortgage given to secure future advances to be paid as the building progresses is a prior lien for claims for material used in the construction of the building for the full amount advanced.¹ Of course the mortgage must be made bona fide,² and given³ and recorded before the lien right has attached.⁴ It is immaterial

therefore fraudulent as to the creditors of the contractor, is not assigned by the wife to a creditor of the contractor until after mechanics' liens have been filed against the building by creditors of the contractor, the mechanics' liens have preference over the mortgage. *Mahoney v. Mc Walters*, 3 App. Div. (N. Y.) 248, 38 N. Y. Supp. 256.

¹ **Kansas.**—*Thomas v. Hoge*, 58 Kan. 166, 48 Pac. 844.

New Jersey.—*Reed v. Rochford*, 62 N. J. Eq. 186, 50 Atl. 70; *Central Trust Co. v. Bartlett*, 57 N. J. L. 206, 30 Atl. 583; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. 539; *Barnett v. Griffith*, 27 N. J. Eq. 201; *Taylor v. La Bar*, 25 N. J. Eq. 222.

New York.—*Lipman v. Jackson*, *Architectural Iron-Works*, 128 N. Y. 58, 27 N. E. 975.

Pennsylvania.—*Moroney's Appeal*, 24 Pa. St. 372.

Wisconsin.—*Wisconsin Planing Mill Co. v. Shuda*, 72 Wis. 277, 39 N. W. 558.

Manitoba.—*Robock v. Peters*, 13 Manitoba 124.

Ontario.—*Cook v. Belshaw*, 23 Ont. 545.

Future Advances.—It is a common knowledge that savings banks, trust companies, and other

lenders of money frequently take mortgages in a similar way to that in which these were given. That is, where an owner of land desires to improve the same by erecting buildings thereon, they take a mortgage for a given amount, a part of which they advance at once, and then, under an agreement made with the mortgagor at the time of the execution of the mortgage, they advance the balance in installments as the work progresses, thus enabling the owner of the land to increase the value of his property and at the same time securing themselves for the loan. And where under such an agreement it is obligatory and not merely optional on the part of the lender to make such future advances, they stand on the same footing as to subsequent incumbrancers as though such advances were made at the time the mortgage was given. *Blackmar v. Sharp*, 23 R. I. 412, 50 Atl. 852.

² *Brooks v. Lester*, 36 Md. 65.

³ *Hewson-Herzog Supply Co. v. Cook*, 52 Minn. 534, 54 N. W. 751.

⁴ **Maryland.**—*Brooks v. Lester*, 36 Md. 65.

New Jersey.—*Young v. Haight*, 69 N. J. L. 453, 55 Atl. 100.

New York.—*Hirshfield v. Ludwig*, 69 Hun (N. Y.) 554, 24 N. Y.

whether the advanced consideration is money or material.⁵ In some jurisdictions the mortgagee cannot claim the benefit of his security to the detriment of a claimant for optional advances made after actual notice of the lien.⁶ Elsewhere it is essential that the mortgage on its face does not show that it is to be paid in future installments,⁷ and also that the mortgage was given for the purpose of raising money that was actually used in the building.⁸ Still others hold that the future payments on the mortgage must be made without notice of the lien claims.⁹ If the mortgagee voluntarily pays the taxes on the mortgaged premises, unless the

Supp. 634; *Stuyvesant v. Browning*, 1 Jones & Sp. (33 N. Y. Super.) 203.

Washington.—*Home Savings & Loan Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940. In order for a lien to be prior to a mortgage, it must be registered before the mortgage. *Reinhart v. Shutt*, 15 Ont. 325.

⁵*Richards v. Waldron*, 20 D. C. 585.

⁶*Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645.

⁷The mortgage was for a single, fixed amount, and contained no provision for future advances. Now, if it be true that equity will look behind the face of the mortgage (and upon this question we express no opinion), it will also, upon the same principle, date the mechanics' liens from the time of furnishing material and doing work. If the one can claim a lien only from the time of paying over his money, surely the other can claim his only from the time of supplying material and doing work. At such times only does

either mortgagee or mechanic part with, or mortgagor and lot-owner receive, value. *Martsoff v. Barnwell*, 15 Kan. 612.

⁸*In re Matthews*, 109 Fed. 603.

⁹A lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor who then conveyed the land in fee to the defendant owner, and having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, it was held that he could not have priority over either lienholder for such advance. *Robock v. Peters*, 13 Manitoba 124.

statute so provides, this will not give him a superior lien for taxes paid.¹⁰

§ 161. **Priority—Mortgage—Record of—Estoppel—After acquired property.**—The general rule is, that a mortgage dates its priority from the time it is filed for record.¹ However, if there is no statutory obligation to have the mortgage recorded, then that fact will have no bearing on its priority.² The fact that the mortgagor did not have the full legal title will not affect its priority as to the interest he really had in the property.³ Some courts have held that a mortgage can not be properly recorded until after it is delivered,⁴ and others

¹⁰*Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177; *Devereux v. Taft*, 20 S. Car. 555.

¹*Colorado*.—*Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

Illinois.—*Thielman v. Carr*, 75 Ill. 385.

Indiana.—*Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632.

Iowa.—*Bartlett v. Bilger*, 92 Iowa 732, 61 N. W. 233.

New Jersey.—*Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq. 189.

Pennsylvania.—*Mitchell v. Evans*, 2 Browne (Pa.) 329.

Wisconsin.—*Mathwig v. Mann*, 96 Wis. 213, 71 N. W. 105, 65 Am. St. 47.

United States.—*Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905; *Moran v. Schnugg*, 7 Ben. (U. S.) 399, 17 Fed. Cas. 9,786. *Evidence. Cahn v. Romandorf (Neb.)*, 93 N. W. 411.

Lien Between Mortgages. — Where mechanics' liens attach to property between the recording of two mortgages, the former of

which is made subject to the latter, the last mortgage will be a first lien to the amount of the first mortgage, the mechanic's lien a second lien, the first mortgage a third lien, and the balance due on the last mortgage a fourth lien, on the land. *Thorpe Block Saving, etc., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978.

²*California*.—*Root v. Bryant*, 57 Cal. 48; *Rose v. Munie*, 4 Cal. 173.

Minnesota.—*Miller v. Stoddard*, 54 Minn. 486, 56 N. W. 131, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; *Noerenberg v. Johnson*, 51 Minn. 75, 52 N. W. 1069; *Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753.

Missouri.—*Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67; *Fletcher v. Kelly*, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347n.

³*Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905.

⁴A mortgage, recorded on May 13, 1870, was not delivered until June 7th following, which latter

that it will be valid if delivered after it is recorded.⁵ Actual knowledge, however, has been held as binding as the constructive notice given by record of a mortgage, and that if a mechanic knows that the mortgage has actually been given he will be bound thereby.⁶ A holder of a mechanic's lien can not claim priority over a mortgage which he was instrumental in having made, and which would work a fraud on the holder of the same.⁷ If the mortgagee induces the material man to furnish the material by accepting orders he afterwards refuses to pay, this will be such a fraud that the mortgagee can not hold a priority on his mortgage.⁸ And it has been held where a mechanic's lien was entitled to priority over a creditor with notice, that if the mortgagee knew that the building was in progress he was a creditor with notice and not en-

date was held to be the date of its registry. *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389.

⁵Judges evenly divided in this case. *Jacobus v. Mutal Ben. Life Ins. Co.*, 27 N. J. Eq. 604.

⁶*Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419; *Harris v. Gardner* (Ky.) 68 S. W. 8, 24 Ky. L. 103; *Bradford v. Anderson*, 60 Neb. 368, 83 N. W. 173.

⁷*Ponder v. Safety Bldg. & Loan Co.* (Ky.) 59 S. W. 858, 22 Ky. L. 1074; *Home Savings & Loan Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940. Essentials of estoppel. *Security Mortgage & Trust Co. v. Caruthers*, 32 S. W. 837, 11 Tex. Civ. App. 430.

Knowledge of Intended use.—Where the building was intended as a homestead, and the holders of mechanics' liens possessed knowledge sufficient to put them on inquiry as to the intended use

of the property, their claims were not entitled to priority in the appropriation of a balance due on the original contract which the owner had deposited in court, as against a claim under the original contract by an assignee who had completed the building in accordance with its terms. *Haldeman v. McDonald* (Tex. Civ. App.), 58 S. W. 1040.

⁸*Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632; *Southern Building & Loan Assn. v. Bean* (Tex. Civ. App.), 49 S. W. 910. A mortgagee who encourages the improvement of the mortgaged property by an agreement to subordinate his lien to the cost thereof is, as to persons furnishing labor and material for use thereon upon the faith of his promise, a promoter of such improvement, and their liens for labor and material are entitled to priority over his mortgage.

titled to priority.⁹ As a matter of course if the mortgagee agrees that the work shall be done, and that it may have priority, he will be estopped to allege the contrary.¹⁰ Mere knowledge will not work an estoppel.¹¹ And if the statute requires something to be done, such as the giving of notice, and it is not done, a mortgage will not lose its priority.¹² A mortgage lien attaches to after acquired property, and is subject to all liens existing or attaching thereon at the time of the acquisition of such property.¹³ As a matter of course a mortgage that is on the premises when the contracting owner purchases the same will have priority over a subsequent lien of a mechanic made under a contract with the purchaser.¹⁴

§ 162. **Priority—Mortgage—Improvements.**—As a general rule, it may be said that improvements become a part of the realty when placed thereon, and the increased value given thereby, if any, inures to the benefit of an existing mortgage.¹ This rule is always applied if the money procured from the mortgage lien is used in the improvements.² The fact that the mechanic was induced to believe by the owner that he

⁹Bond Lumber Co. v. Masland, 45 Fla. 188, 34 So. 254.

¹⁰Soule v. Dawes, 14 Cal. 247.

¹¹Capital Lumbering Co. v. Ryan, 34 Ore. 73, 54 Pac. 1093; Pride v. Viles, 3 Sneed (Tenn.) 125.

¹²Fuquay v. Stickney, 41 Cal. 583; Hanchey v. Hurley, 129 Ala. 306, 30 So. 742.

¹³Harris v. Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69; Reed v. Ginsburg, 64 Ohlo St. 11, 59 N. E. 738; Botsford v. New Haven, etc., R. Co., 41 Conn. 454.

¹⁴Morris County Bank v. Rockaway Mfg. Co., 14 N. J. Eq. 189.

¹Delaware. — Knowles Loom Works v. Vacher (Del. Super.), 65 Atl. 26.

Iowa.—Klene v. Hodge, 90 Iowa 212, 77 N. W. 717; Curtis v. Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314.

Missouri.—Reed v. Lambertson, 53 Mo. App. 76.

New Jersey.—Reed v. Rochford, 62 N. J. Eq. 186, 50 Atl. 70; New-ark Lime & Cement Co. v. Morrison, 15 N. J. Eq. 133.

Oregon.—Inverarity v. Stowell, 10 Ore. 261.

Texas. — Martin v. Texas Briquette & Coal Co. (Tex. Civ. App.), 77 S. W. 651.

²Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579; Wroten v. Armat, 31 Gratt. (Va.) 228.

should be paid out of money gotten from the mortgage, will not make the mortgage inferior to the mechanic's lien.³ Where however, the statute makes the mechanic's lien a lien on the improvement, and not alone on the "lot of land" upon which it is located, then the mechanic's lien will be a prior lien on the improvements, the existing mortgage lien remaining a prior one on the land.⁴ Especially is this true if the improvements can be removed without affecting the value of the property as to the pre-existing mortgage.⁵ If the improvements are such as are known as trade fixtures, erected by a tenant for his convenience, the general rule is that the mechanics' lien will attach thereto and it will be prior to a

³*Chaffee v. Schestedt* (Neb.) 96 N. W. 161; *Patrick Land Co. v. Leavenworth*, 42 Neb. 715, 60 N. W. 954.

⁴*Alabama*.—*Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305n.

Indiana. — *Building & Loan Assn. v. Coburn*, 150 Ind. 684, 50 N. E. 885; *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

Kansas.—*Getto v. Friend*, 46 Kan. 24, 26 Pac. 473.

Mississippi.—*Otley v. Haviland*, 36 Miss. 19.

Missouri.—*Crandall v. Cooper*, 62 Mo. 478; *McAdow v. Sturtevant*, 41 Mo. App. 220; *Hall v. St. Louis Mfg. Co.*, 22 Mo. App. 33.

South Dakota. — *Laird-Norton Co. v. Herker*, 6 S. Dak. 509, 62 N. W. 104. The word "Land" as used in *Mechanic's Lien Law*, Illinois 20, providing that, where a mortgage of land to which a mechanic's lien attaches is the prior lien, it shall retain its priority to the extent of the value of the land at the time the contract is made

with the mechanic or material man, means the land with such improvements as were on it at the execution of the mortgage. *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481.

⁵*Tower v. Moore*, 104 Iowa 345, 73 N. W. 823; *Fischer v. Anslyn*, 30 Mo. App. 316; *Johnson v. Puritan Mining Co.*, 19 Mont. 30, 47 Pac. 337; *Laird-Norton Co. v. Herker*, 6 S. Dak. 509, 62 N. W. 104. Chattel mortgage on property slightly attached. *First Nat. Bank v. Elmore*, 52 Iowa 541, 3 N. W. 547. The priority of lien on a building given by Comp. Laws to one who furnishes material, as against an existing incumbrance on the land, does not exist, unless the building or improvement was wholly erected subsequently to the attaching of the lien of the incumbrance, and can be sold and removed from the land, without unlawfully invading the rights of the earlier incumbrancer. *James River Lumber Co. v. Danner*, 3 N. Dak. 470, 57 N. W. 343.

mortgage on the real estate.⁷ A building resting on posts does not from this fact alone become a movable improvement.⁸ Some courts have held that if a new building is erected in the place of one burned, a lien for erecting the same will be prior to a pre-existing mortgage.⁹ Unless the statute makes such an exception, however, this will not be true. If the mortgage requires improvements to be made, as a matter of course a lien for constructing the same will be prior to the mortgage.¹⁰ However, if the person has no title or is not an owner within the meaning of the statute, improvements put on by him can not give a mechanic's lien prior claim over a mortgage afterwards given for purchase money.¹¹ Some courts have held that it is sufficient to give a lien priority if the mortgagee knew of the contract for the improvement,¹² or consents to it.¹³ But as a general rule it is not obligatory on the part of the mortgagee to see that his money is used in the improvement if his mortgage is such as would give a mechanic proper notice before the improvements are begun.¹⁴ The mechanic asserting his lien must show that he is entitled to priority before the same can be allowed.¹⁵ Where the

⁷Heidelbach v. Jacobi, 28 N. J. Eq. 544. See Leaseholds, § 141; Incumbrances, § 151; Fixtures, § 12.

⁸Rowland v. Sworts, 17 N. Y. Supp. 399, 63 Hun (N. Y.) 625 (without opinion).

⁹Schulenburg v. Hayden, 146 Mo. 583, 48 S. W. 472; People's Building, etc., Assn. v. Clark (Tex. Civ. App.), 33 S. W. 881.

¹⁰Hillhouse v. Pratt, 74 Conn. 113, 49 Atl. 905; Allfree Mfg. Co. v. Henry, 96 Wis. 327, 71 N. W. 370.

¹¹Birmingham Bldg. & Loan Assn. v. Boggs, 116 Ala. 587, 22 So. 852, 67 Am. St. 147.

¹²Humbolt Bldg. Assn. v. Volmering (Ky.), 47 S. W. 1084, 20 Ky. L. 899. Knowledge of an agent sufficient. In re Wagner, 110 Fed. 931.

¹³Baker v. Robbins, 119 N. Car. 289, 25 S. E. 876; Allfree Mfg. Co. v. Henry, 96 Wis. 370, 71 N. W. 370.

¹⁴Anglo-American Savings, etc. Assn. v. Campbell, 13 App. Cas. (D. C.) 581, 43 L. R. A. 622.

¹⁵Davis v. Alvord, 94 U. S. 545, 24 L. ed. 283. Where houses are built on wrong lot, not entitled to priority. Smith v. Barnes, 38 Minn. 240, 36 N. W. 346.

statute allows the mortgagor to collect attorney fees, it is held that the lien is prior to such attorney fees.¹⁶

§ 163. **Priority—Vendor's lien.**—A vendor's lien is a secret lien, and as it is the policy of the law that all liens shall be open, and no one misled thereby, such liens are not favored over claims of persons who have incurred claims antagonistic thereto, exercising reasonable caution.¹ It rests upon a strong equity and is generally recognized.² So it has been held where the contracting owner has only an equitable right and title thereon, the owner retaining the legal title until the conditions for a conveyance are satisfied his lien or claim is prior to that of a mechanic, who has performed work on the property under the contracting owner.³ This has been held true even though the vendor knew and consented that im-

¹⁶ *Garrett v. Adams* (Tenn. Ch. App.), 39 S. W. 730.

¹ *Ansley v. Pasahro*, 22 Neb. 662, 35 N. W. 885. See Dec. & Am. Dig. tit. Mechanics' Liens § 199.

² *Pomeroy's Eq. Vol. 3*, p. 251, gives the following states as recognizing the doctrine: Alabama, Arkansas, California, Colorado, Dakota, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas, Wisconsin; and the following as having rejected it, either by decision of courts or statutes: Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia. (See *Pomeroy's Equity*, Vol. 3, p. 253.)

³ *Iowa*.—*Millard v. West*, 50 Iowa 616.

Kentucky.—*Northern Bank of Kentucky v. Deckebach*, 83 Ky. 154; *Orr v. Batterton*, 14 B. Mon. (Ky.) 100; *Grainger v. Old Kentucky Paper Co.*, 105 Ky. 683, 49 S. W. 477, 20 Ky. L. 1491; *Cooley v. Black*, 105 Ky. 267, 48 S. W. 1075, 20 Ky. L. 1181.

Mississippi.—*English v. Foote*, 8 Sm. & M. (Miss.) 444.

Pennsylvania.—*Fordham's Appeal*, 78 Pa. St. 120; *Stoner v. Neff*, 50 Pa. St. 258; *Kline v. Lewis*, 1 Ashm. (Pa.) 31.

Tennessee.—*Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136; *Gillespie v. Bradford*, 7 Yerg. (Tenn.) 168, 27 Am. Dec. 494.

Washington.—*Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996; *St. Paul, etc., Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787.

provements should be made.⁴ However, and this seems to be a more equitable doctrine, some courts have held that if the legal owner suffers the improvements to be made without warning the mechanic of the contracting owner's title, that a mechanics' lien will be superior to the legal owner's lien.⁵ If the contract between the vendor and the vendee required the erection of the building, then the mechanic's lien will be given priority.⁶ If the improvement is made by a tenant, like other improvements, if removed, the lien of a mechanic is superior.⁷ Where a lien is on improvements separate from the land a mechanic's lien will be prior to a purchase money

⁴*Kuschel v. Hunter* (Cal.) 50 Pac. 397; *West v. Reeves*, 53 Neb. 472, 73 N. W. 935; *Charleston Lumber & Mfg. Co. v. Brockmyer*, 18 W. Va. 586.

⁵*Leonard v. Cook* (N. J. Eq.), 20 Atl. 855.

⁶*Illinois*.—*Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490.

Iowa.—*Janes v. Osborne*, 108 Iowa 409, 79 N. W. 143; *Jameson v. Gile*, 98 Iowa 490, 67 N. W. 396; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294.

Nebraska.—*Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 46 N. W. 1123, 12 L. R. A. 33n.

Tennessee.—*Lee v. Gibson*, 104 Tenn. 698, 58 S. W. 330.

⁷*Logan v. Taylor*, 20 Iowa 297; *Walbridge v. Barrett*, 21 Ohio C. C. 522, 11 Ohio Cir. Dec. 634; *Phelps v. Edwards*, 52 Tex. 371. W. purchased of R., and paid for, a town lot; the title being held by J., the wife of R. It was agreed that R. should sell the lot for W., and that the title should be conveyed by R. and J. to the purchaser when sold. R. contracted

with K. and B. to sell the lot to them, took their notes for the purchase money, and gave them possession in April, 1855. Mechanics employed by K. and B. proceeded to erect a building on the lot, and respectively perfected their liens under the statute. R. and J. conveyed the lot by deed of October 5th (recorded December 22d) to K. and B., who, October 13th, executed a mortgage left for record November 1st to secure the notes for the purchase money. It did not appear that the mechanics had any notice as to the title. The notes and mortgages were afterwards transferred to W., who brought suit against K. and B., making the mechanics parties. Held, that the vendor's lien arose at the time of sale by contract and giving possession, and that the lien was not impaired either by the deed or mortgage. The mechanics' liens at their inception were liens only upon the estate or interest of K. and B., and necessarily subject to any prior liens upon the same

mortgage on the land,⁸ or a vendor's lien so far as the improvement may be concerned, but not upon the land itself.⁹ If fixtures become detached and are sold, it is held that a mechanic's claim to the fund is superior to that of the vendor on the premises.¹⁰ Where the statutes permit the lien to be separate upon the improvements, if it is the intention of the parties that the improvements shall lose their identity and become part of the real estate, then the vendor's lien will become superior.¹¹

§ 164. **Priority—Purchase money mortgage.**—A purchase money mortgage rests upon the same principles as a vendor's lien and in addition thereto it has the advantage of not being a secret lien and it has been held that where a mortgage is given simultaneously with a deed for the property to secure the unpaid purchase price that such mortgage is prior to the lien of a mechanic for labor or materials furnished under a contract with a vendee in possession prior to the execution of the mortgage.¹ And this is true even though the deed and mortgage

lot. *Neill v. Kinney*, 11 Ohio St. 58.

⁸ See § 162.

⁹ *Illinois*.—*Wing v. Carr*, 86 Ill. 347.

Iowa.—*Stockwell v. Carpenter*, 27 Iowa 119.

Kentucky.—*Slocum v. Caldwell* (Ky.), 13 S. W. 1069, 12 Ky. L. 514.

Louisiana.—*Jamison v. Barelli*, 20 La. Ann. 452; *Baltimore v. Parlange*, 23 La. Ann. 365.

Texas.—*Land Mortgage Bank v. Quanah Hotel Co.*, 89 Tex. 332, 34 S. W. 730.

Washington.—*Bell v. Groves*, 20 Wash. 602, 56 Pac. 401. May be apportioned. *Grainger v. Old Kentucky Paper Co.*, 105 Ky. 683, 49 S. W. 477, 20 Ky. L. 1491.

¹⁰ *Smith v. Moore*, 26 Ill. 392.

¹¹ *Watson v. Markham*, 33 Tex. Civ. App. 476, 77 S. W. 660.

¹ *Iowa*.—*Thorpe v. Durbon*, 45 Iowa, 192.

Kansas.—*Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4, 45 Pac. 722.

Massachusetts.—*Osborne v. Varnes*, 179 Mass. 597, 61 N. E. 276; *Saunders v. Bennett*, 160 Mass. 48, 35 N. E. 111, 39 Am. St. 456; *Perkins v. Davis*, 120 Mass. 408.

Minnesota.—*Hill v. Aldrich*, 48 Minn. 73, 50 N. W. 1020.

Missouri.—*Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. 563; *Bridewell v. Clark*, 39 Mo. 170; *Wilson v. Lubke*, 176 Mo. 210, 75 S. W. 602, 98 Am. St. 503.

Nevada.—*Virgin v. Brubaker*, 4 Nev. 31.

are not recorded until after the labor is performed.² If, however, a deed is put on record and after an interval of time, the mortgage is put on record and work is done during and after the interval, it has been held that the mortgage will not be prior to the lien for work done during and after the interval.³ And the same rule will apply if the mortgage was not made until some time after the deed had been made and put on file.⁴ Some courts have made the test to be whether at the time the lien attaches the vendee had such an interest as would support the lien.⁵ Of course if the holder or owner of the purchase-money mortgage agrees that it may be subject to the mechanic's lien that agreement will prevail and the lien will have priority.⁶ However, it has been held that if he merely agrees that it shall be subordinate to a mortgage to raise money to build with, that this will not make his mortgage secondary to a mechanics' lien.⁷ A Minnesota court, however, has held that in such a case the mortgage would lose its

New Jersey.—*Lamb v. Cannon*, 38 N. J. L. 362; *Mutual Life Ins. Co. v. Walling*, 51 N. J. Eq. 99, 26 Atl. 453; *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Strong v. Van Deursen*, 23 N. J. Eq. 369.

Pennsylvania.—*McCree v. Camplon*, 5 Phila. (Pa.) 9; *Kelly's Appeal* (Pa.), 2 Atl. 868.

Wisconsin.—*Rees v. Ludington*, 13 Wis. 276 [308], 80 Am. Dec. 741. Lots purchased at different times. *Smith v. Wilkins*, 38 Ore. 583, 64 Pac. 760. In determining what is a purchase money mortgage, the test is not whether the mortgage for the purchase money is given to the vendor, but whether it is to be used as purchase money. *Commonwealth Title Insurance & Trust Co. v. Ellis*, 22 Pa. Co. Ct. 86, 8 Pa. Dist.

5, citing *Jackson v. Austin*, 15 Johns. (N. Y.) 477.

²*Oliver v. Davy*, 34 Minn. 292, 25 N. W. 629.

³*Haupt Lumber Co. v. Westman*, 49 Minn. 397, 52 N. W. 33. Mechanics' liens have priority over a purchase-money judgment entered on judgment notes more than four months after liens attach. *Allen v. Oxnard*, 152 Pa. St. 621, 25 Atl. 568.

⁴*Ansley v. Pasahro*, 22 Neb. 662, 35 N. W. 885.

⁵*Moody v. Tschabold*, 52 Minn. 51, 53 N. W. 1023; *McCausland v. West Duluth Land Co.*, 51 Minn. 246, 53 N. W. 464; *Kittredge v. Neumann*, 26 N. J. Eq. 195.

⁶*Bassett v. Menage*, 52 Minn. 121, 53 N. W. 1064.

⁷*Hoagland v. Lowe*, 39 Neb. 397, 58 N. W. 197.

priority.⁸ And under a few statutes, the purchase-money mortgage has been held to be subordinate to a lien for materials furnished before it is made and recorded.⁹ Kentucky courts have held, that if the purchaser receives notice of the lien, before the payment of the whole of the purchase-money, that the lien will attach to the purchase money remaining unpaid.¹⁰ The doctrine as to the priority of a purchase-money mortgage has not been confined to the original parties, and it is held that mortgages given to secure the purchase money to a third person, and simultaneously recorded, will be prior to the lien of a material man for materials furnished to a person other than the owner, prior to the execution of the mortgage.¹¹ If, however, it is not executed for some time, it will lose its priority.¹² If the vendor retains the title until the price is paid, and then conveys the property to another, and this third person gives a mortgage for the purchase money, it is superior to the mechanic's lien.¹³ In a case where the vendor agrees to complete the building and in pursuance of such agreement, purchases material, then the mechanic's lien will be prior to a mortgage made to a third person for the purchase money.¹⁴

⁸*Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; *Reilly v. Williams*, 47 Minn. 590, 50 N. W. 826.

⁹*Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272; *Tanner v. Bell*, 61 Ga. 584. Contracted for before. *Phoenix Mut. Life Ins. Co. v. Batchen*, 6 Ill. App. 621.

¹⁰*Kentucky Bldg. & Loan Assn. v. Kister*, 101 Ky. 321, 41 S. W. 293, 19 Ky. L. 494. If the owner sells the house, and takes a purchase money mortgage it will not be prior to a lien for materials purchased by him. *American Fire Ins. Co. v. Pringle*, 2 Serg. & R. (Pa.) 138.

¹¹*Connecticut—Middleton Sav. Bank v. Fellowes*, 42 Conn. 36.

Massachusetts—Thaxter v. Williams, 14 Pick. (Mass.) 49.

New Jersey—New Jersey Bldg., Loan & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

Pennsylvania—Campbell's Appeal, 36 Pa. St. 247, 78 Am. Dec. 375n; *Weldon v. Gibbon*, 2 Phila. (Pa.) 176.

¹²*Soule v. Hurlbut*, 58 Conn. 511, 20 Atl. 610.

¹³*Mutual Aid Building & Loan Co. v. Gashe*, 56 Ohio St. 273, 46 N. E. 985.

¹⁴*Erdman v. Moore*, 58 N. J. L. 445, 33 Atl. 958.

A third person has no greater rights than the vendor.¹⁵ Where the lien is entitled to priority, the fact that the owner obtains the money on a mortgage for the purpose of paying for the land, will not give the mortgage priority.¹⁶ And in no case can the mechanic's lien be prior, unless at the time the materials were furnished, the person making the contract had such an interest as could be subjected to a lien.¹⁷

¹⁵*Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Reilly v. Hudson*, 62 Mo. 383.

¹⁶*Wetmore v. Marsh*, 81 Iowa 677, 47 N. W. 1021.

¹⁷*Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680.

CHAPTER 5.

ASSIGNMENT OF LIEN AND INDEMNITY AGAINST LIEN.

Sec. 165. Assignability of lien. 166. Assignability of lien— Form—Partnership—Death of claimant. 167. Effect of assignment of claim or lien.	Sec. 168. Indemnity against liens by contractor to owner. 169. Bonds of contractor. 170. Indemnity bond—Liability. 171. Indemnity bond—Estoppel of surety—Retention of money. 172. Indemnity bond—Action on.
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§ 165. **Assignability of lien.**—At common law, a chose in action was not assignable, and therefore, until that rule was modified either by statute or the decisions of courts, a valid assignment could not be made of a claim either before or after it was perfected into a lien.¹ Under the rules adopted that the real parties in interest should always bring suit thereon, unless the statute relating to mechanic's liens clearly indicates to the contrary, the right is not confined to the mechanic alone.² The perfected lien is generally held to be assignable.³ Upon

¹Rogers v. Omaha Hotel Co., 4 Neb. 54; Lovett v. Brown, 40 N. H. 511; Caldwell v. Lawrence, 10 Wis. 331. See Dec. & Am. Dig. tit Mechanics' Liens § 202.

²McCrea v. Johnson, 104 Cal. 224, 37 Pac. 902; Fitzgerald v. Trustees of First Presbyterian Church of City of Port Huron, 1 Mich. (N. P.) 243.

Conflicting Decisions.—The decisions on the point in other states are no doubt somewhat conflicting, although the conflict may be explained to some extent by the different provisions of various statutes, some showing more

clearly than others that only a personal right was intended to be conferred. But the weight of authority is clearly to the point that the said right cannot be assigned. Mills v. La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. 168.

³Minnesota.—Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205.

Nebraska.—Goodman, etc., Co. v. Pence, 21 Neb. 459, 32 N. W. 219; Rogers v. Omaha Hotel Co., 4 Neb. 54.

Nevada.—Skyrme v. Occidental Mill, etc., Co., 8 Nev. 219.

this proposition there seems to be no doubt, but upon the question whether the assignment of the claim before it has reached the stage of a perfected lien is assignable is a matter upon which the courts are not in accord. A number hold that the mere right is not assignable.⁴ And this is held to apply, even where the statute specifically made the lien assignable.⁵ Under other statutes, however, it is held that the right even though not perfected as a lien is assignable, and that the assignee may proceed and perfect the lien in accordance with same.⁶ The courts holding the latter view seem to be more in accord with the growing idea of the law, and in time this will no doubt become the prevailing doctrine. So it has been held where the statute gives a lien on the fund, that the right thereto is assignable. This decision however was made under a statute which allowed the assignment of the claim.⁷ Of course if the holder of the claim goes into bankruptcy or insolvency, the trustee or assignee will succeed to his rights.⁸

New York.—*Roberts v. Fowler*, 3 E. D. Smith (N. Y.) 632, 4 Abb. Pr. (N. Y.) 263.

Oregon.—*Brown v. Harper*, 4 Ore. 89.

South Carolina.—*Oliver v. Fowler*, 22 S. Car. 534.

United States.—*Davis v. Billand*, 18 Wall. (U. S.) 659, 21 L. ed. 969. Statute controls. *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. (N. Y.) 214, 104 N. Y. Supp. 653.

⁴*Rauer v. Fay*, 110 Cal. 361, 42 Pac. 902; *Griswold v. Carthage*, etc., R. Co., 18 Mo. App. 52; *Rollin v. Cross*, 45 N. Y. 766; *Roberts v. Fowler*, 3 E. D. Smith (N. Y.) 632, 4 Abb. Pr. (N. Y.) 263. Assignee of the mechanic is entitled to a lien, and may make the affidavit necessary for registra-

tion. *Kelly v. McKenzie*, 1 Manitoba 169.

⁵*Langan v. Sankey*, 55 Iowa 52, 7 N. W. 393; *Brown v. Smith*, 55 Iowa 31, 7 N. W. 401.

⁶*Peatman v. Centerville Light, Heat & Power Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276; *McAlister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887; 9 Det. Leg. N. 645; *Hoagland v. Van Etten*, 31 Neb. 292, 47 N. W. 920.

⁷*Bank v. School Directors of Town of Iron River*, 91 Wis. 596, 65 N. W. 368. As to what constitutes an equitable assignment see *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. (N. Y.) 214, 104 N. Y. Supp. 653.

⁸*Sprague Inv. Co. v. Mouat Lumber & Inv. Co.*, 14 Colo. App. 107, 60 Pac. 179; *Davis v. Fidelity*

§ 166. **Assignability of lien—Form—Partnership—Death of claimant.**—There is no particular form, in the absence of statutory requirement necessary to make a valid transfer,⁹ unless the court should hold that such assignment passes an interest in real estate, then it would need to be in writing.¹⁰ And where courts hold that the assignment of the debt carries with it the lien, the assignment may be by parol.¹¹ To constitute a valid assignment, however it should be absolute, and not a mere conditional order,¹² and under some statutes it is held that the assignee should notify the owner, so that the owner will not make payments to the assignor. This seems to be a salutary rule in order to prevent the working of a fraud.¹³ If the contract itself is fraudulently assigned, which it seems could not be done, unless all parties consented, and the assignee thereafter performed it, he would undoubtedly be entitled to enforce his lien.¹⁴ If a partner should sell his interest in the firm, whether to a third person,¹⁵ or to the remaining members of the firm, this will not destroy or affect the right of the firm to the lien.¹⁶ If the firm is dissolved, the

& Deposit Co., 75 App. Div. (N. Y.) 518, 78 N. Y. Supp. 336.

⁹Clarkson v. Louderback, 36 Fla. 660, 19 So. 887.

Sufficient.—An assignment of "our claim against M." for material furnished on a building, made after the filing of the lien and prior to the commencement of the suit, is sufficient to constitute an assignment of the lien as against the owner; both the assignor and the assignee testifying that it was intended as an assignment of the lien, in order that it might be foreclosed in the same suit with the lien of the assignee. Nottingham v. McKendrick, 38 Ore. 495, 57 Pac. 195, 63 Pac. 822.

¹⁰Ritter v. Stevenson, 7 Cal. 388.

¹¹Trueblood v. Shellhouse, 19 Ind. App. 91, 49 N. E. 47.

¹²Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; Van Kannel Revolving Door Co. v. Astor, 119 App. Div. (N. Y.) 214, 104 N. Y. Supp. 653.

¹³In re Well's Estate, 2 Del. Co. Ct. (Pa.) 172.

¹⁴Schalk v. Norris, 7 Misc. (N. Y.) 20, 27 N. Y. Supp. 390; McDonald v. Kelly, 14 R. I. 335; Iaege v. Bossieux, 15 Gratt. (Va.) 83, 73 Am. Dec. 189.

¹⁵Simons v. Webster, 108 Cal. 16, 40 Pac. 1056.

¹⁶Milwaukee Mechanics' Ins.

partner owning the claim can enforce it.¹⁷ And if a claimant dies, his rights may be enforced by his administrator.¹⁸ When the contractor assigns his claim, it can only act on the amount in the hands of the owner and due the contractor at the time the assignment is made.¹⁹

§ 167. **Effect of assignment of claim or lien.**—In jurisdictions where the right or claim before it is perfected may be assigned it is necessarily held, that the assignment of the same carries with it the right to perfect the lien and enforce it.¹ The courts holding that the debt or claim may not be assigned so as to convey a right of action on the debt, very consistently hold that the assignee cannot perfect the lien.² Where the assignment is not absolute, then the right remains

Co. v. Brown, 3 Kan. App. 225, 44 Pac. 35.

¹⁷Brown v. School District, 48 Kan. 709, 29 Pac. 1069; Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 Pac. 35; Busfield v. Wheeler, 14 Allen (Mass.) 139; Ogden v. Alexander, 140 N. Y. 356, 35 N. E. 638.

¹⁸Telfer v. Kierstead, 2 Hilt. (N. Y.) 577. But if a firm sells out this of itself, it will not carry the right to its successor. Bohem v. Seabury, 141 Pa. St. 594, 21 Atl. 674. Or if it loses its identity as by a partnership being incorporated. Allen v. Frumet Min. & Smelting Co., 73 Mo. 688.

¹⁹Carter v. Brady, 51 Fla. 404, 41 So. 539.

¹Alabama. — Leftwich Lumber Co. v. Florence Mutual Bldg., Loan & Savings Assn., 104 Ala. 584, 18 So. 48.

Colorado.—Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350;

Sprague Inv. Co. v. Mouat Lumber, etc., Co., 14 Colo. App. 107, 60 Pac. 179.

Indiana.—Jenckes v. Jenckes, 145 Ind. 624, 44 N. E. 632.

Minnesota.—Kinney v. Duluth Ore. Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. 528n.

Missouri.—Jones v. Hurst, 67 Mo. 568.

Montana.—Mason v. Germaine, 1 Mont. 263.

Wisconsin.—Bank v. School Directors of Town of Iron River, 91 Wis. 596, 65 N. W. 368. In Massachusetts the lien is created when the labor is performed and an assignment of the claim after the labor is performed carries the lien with it. Willey v. Connelly, 179 Mass. 360, 60 N. E. 784.

See Dec. & Am. Dig. tit. Mechanics' Liens § 204.

²Hooper v. Sells, 58 Ga. 127; Noll v. Kenneally, 37 Neb. 879, 56 N. W. 722; Zachary v. Perry, 130 N. Car. 289, 41 S. E. 533.

in the assignor to perfect a lien securing the same,³ as where, for example, he assigns only a part of the debt,⁴ or gives it as collateral security,⁵ or delivers an unaccepted order for payment,⁶ or gives a promissory note with no intent to assign lien.⁷ And some courts have held that even if the assignment be an absolute one the assignor still has such an interest in the claim that if he has not already perfected the lien, he may do so, and this doctrine seems to be a growing one.⁸ Assignments of claims have been carried far enough to protect the equitable rights of the assignee in installments not yet due.⁹ The debt—if that is the intent of the parties—may be assigned without taking with it the right to the lien.¹⁰ As a matter of course if both the assignee and assignor should fail to perfect the lien as the statute requires, the lien right is lost.¹¹ The fact that the claim is purchased by one as agent for the owner,¹² or even after suit is brought, will not defeat the as-

³*Ittner v. Hughes*, 154 Mo. 55, 55 S. W. 267.

⁴*Hamilton v. Whitson*, 5 Kan. App. 347, 48 Pac. 462.

⁵*California*—*Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312.

Illinois—*Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728.

Indiana—*Shapiro v. Schultz*, 32 Ind. App. 219, 68 N. E. 184.

Minnesota—*Davis v. Crookston Waterworks, Power & Light Co.*, 57 Minn. 402, 59 N. W. 482, 47 Am. St. 622.

Missouri—*Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110.

New York—*Gaas v. Souther*, 167 N. Y. 604, 60 N. E. 1111.

Washington—*Potvin v. Denny Hotel Co.*, 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002.

⁶*Omaha Oil & Paint Co. v. Greater American Exposition Co.* (Neb.), 93 N. W. 963.

⁷*St. John v. Hall*, 41 Conn. 522; *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819.

⁸*Linneman v. Bleber*, 85 Hun (N. Y.) 477, 33 N. Y. Supp. 129; *Hallahan v. Herbert*, 11 Abb. Pr. (N. S.) (N. Y.) 326, 4 Daly (N. Y.) 209.

⁹*Donnelly v. Johnes*, 58 N. J. Eq. 442, 44 Atl. 180. But the lien can not be perfected until the right has accrued and the installment becomes due. *Merchant v. Ottumwa Water Power Co.*, 54 Iowa 451, 6 N. W. 709.

¹⁰*Friedman v. Roderick*, 20 Ill. App. 622; *Peatman v. Centerville Light, Heat & Power Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276.

¹¹*English v. Lee*, 63 Hun (N. Y.) 572, 18 N. Y. Supp. 576.

¹²*Title Guarantee & Trust Co.*

signment if the purchaser is made a party.¹³ If the statute requires an assignment to be in writing of course it must be so done to make it valid.¹⁴ If the lien or right is assignable it necessarily carries with it a judgment rendered thereon,¹⁵ and the assignee is subrogated to all the rights of the assignor.¹⁶ He may object to the validity of the claim of a subcontractor against his assignor.¹⁷ If he has the claim of the principal contractor he takes it subject to the rights of the subcontractor,¹⁸ or defenses of the owner.¹⁹ If the purchase is bona fide, it is immaterial what the purchaser may have given for the claim.²⁰ The purchaser takes the claim, however, as it stood at the time of the assignment.²¹

v. Wrenn, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454. (Does not merge in the fee if that was not intended.)

¹³If the contractor goes into bankruptcy after the claim is assigned, it will not affect the assignee's rights and the trustee in bankruptcy cannot settle the same to the detriment of the rights of the assignee. *Kudner v. Bath*, 135 Mich. 241, 97 N. W. 685, 10 Det. Leg. N. 742; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729; *Lawrence v. Congregational Church*, 32 App. Div. (N. Y.) 489, 53 N. Y. Supp. 145.

¹⁴The holder of a mechanic's lien claim on which suit had been commenced, assigned it in writing as follows: "I * * * do hereby sell, assign and transfer * * * all my right, title and interest and claim to a mechanic's lien, as set forth and claimed by me in the above-entitled suit, and in the petition and amended petition filed therein." "It is understood that the assignment

* * * does not include subsidiary notes taken by (the assignor), and now in the D. Bank, in the sum of about \$6,000." Parol evidence was not admissible to show that the notes were collateral to a part of the claim, and that such part was not assigned. *Bigelow v. Willson*, 77 Iowa 603, 42 N. W. 501; *Shearer v. Browne*, 102 Wis. 585, 78 N. W. 744.

¹⁵*Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151, 21 L. ed. 775.

¹⁶*Henry & Coatsworth Co. v. Fisherdict*, 37 Neb. 207, 55 N. W. 643; *Rogers v. Omaha Hotel Co.*, 4 Neb. 54; *Skyrme v. Occidental Mill & Min. Co.*, 8 Nev. 219.

¹⁷*Keim v. McRoberts*, 18 Pa. Super. Ct. 167.

¹⁸*St. Paul's Methodist Episcopal Church v. Gorman*, 10 Ohio Cir. Dec. 103.

¹⁹*Goldman v. Brinton*, 90 Md. 259, 44 Atl. 1029.

²⁰*Title Guarantee & Trust Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454.

²¹*First Nat. Bank v. Campbell*,

§ 168. **Indemnity against liens by contractor to owner.**—Somewhat akin to the assignment of liens, in that a third person may become interested in such matters is the case where a bond is given by a contractor to the owner to save the owner harmless against any liens, that may be asserted on the property. These bonds have no connection with the right of the mechanic to a lien on the premises for labor done or material furnished. Some states have passed laws making the owner, after he has entered into a contract with a contractor, liable to the subcontractor or material man without regard to whether or not there may be anything due from the principal contractor for work done thereunder. Some few courts—Ohio among the number,¹—have held that such laws are not constitutional but the prevailing opinion is that they are constitutional and that when the owner enters into a contract with another to make certain improvements for him, that he confers upon such third person an agency to purchase necessary materials and proper labor to complete the contract. Where such statutes have been passed, the only way open to an owner to save himself harmless against an unreliable contractor is to take a bond of indemnity. As a general rule, while these bonds in an indirect way inure to the benefit of subcontractors, yet unless so stipulated in the bond or expressly made so by statute, the material man or subcontractor cannot sue on such bond. The material man or subcontractor must pursue the property upon which the labor has been per-

24 Tex. Civ. App. 160, 58 S. W. 628. No lien in existence. *English v. Lee*, 63 Hun (N. Y.) 572, 18 N. Y. Supp. 576. Payment to assignor. *McCormick v. Sadler*, 21 Utah 62, 60 Pac. 547. Waiver of lien by assignor. *Kent Lumber Co. v. Ward*, 37 Wash. 60, 79 Pac. 485. An assignee of the contract price for the erection of a building

is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee. *Anly v. Holy Trinity Church*, 2 Manitoba 248.

¹ See § 4, as to constitutionality of law, and § 8 as to construction of law. See Dec. & Am. Dig. tit. Mechanics' Liens, § 312. See § 46 Form of bond.

formed.² These building contracts or indemnity bonds in relation to the rights of a surety are strictly construed.³ It has been held before the owner can take advantage of such a bond or sue thereon he must have complied with his contract,⁴ and furthermore that no action can be maintained thereon until there has been a breach of the bond, or some probability at least of having his property taken for a mechanic's lien.⁵ In some states, the statute requires,—especially where the contractor deals with a public corporation—that he must give an indemnity bond, and it is usually provided therein that this bond is for the benefit of material men or subcontractors and that they may maintain an action thereon.⁶

§ 169. **Bonds of contractor.**—Where the statute requires the original contract to be recorded, and this has not been done, and the bond has been given by the contractor to secure the owner against claims of material men, it is held that this failure to record the original contract will not invalidate the indemnity bond.¹ And the same rule will be applied where specifications have not been filed as required by statute.² So too, it has been held that the fact that the person to whom the

² Sayre-Newton Lumber Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. 844.

³ Boas v. Maloney, 138 Cal. 105, 70 Pac. 1004. "With a full release of liens." This clause was intended to protect the owner against liens and claims arising under the mechanic's lien law. Titus v. Gunn, 69 N. J. L. 410, 55 Atl. 735.

⁴ Wagner v. Ditte, 2 Mo. App. 254.

⁵ Friend v. Ralston, 35 Wash. 422, 77 Pac. 794; Nash v. Commonwealth, 174 Mass. 335, 54 N. E. 865.

⁶ A provision in a contract for a municipal improvement, that

the contractor will not permit any liens to remain on the property, was for the benefit of the corporation merely, and hence did not prevent an assignment of the contractor's claim against the city, nor affect the question of priority of such assignment over liens subsequently filed. McKay v. New York, 46 App. Div. (N. Y.) 579, 62 N. Y. Supp. 58.

¹ Kiessig v. Allspaugh, 99 Cal. 452, 34 Pac. 106, also 91 Cal. 234, 27 Pac. 662. See Dec. & Am. Dig. tit. Mechanics' Liens, § 313.

² Blyth v. Robinson, 104 Cal. 239, 37 Pac. 904.

bond was given was not in fact the owner of the premises, the bond would be good if he had an interest therein that demanded protection.³ Where a bond is given by virtue of statutory provisions, it may be held void if the statute is declared unconstitutional.⁴ But if the bond is not given pursuant to the statute, it may be good as between the parties, even if a statute relating to bonds of that character is unconstitutional. If the law requires the bond to be filed, and it is not done, then it can not be enforced.⁵ However, if the delay in making or filing results from the fraud of the surety, he could not set up the fact of a failure to file.⁶ The consideration that moves the making of the principal contract is sufficient to support the indemnity bond.⁷ It is not necessary that the indemnity bond should be given at the same time that the original contract is made.⁸ However, a bond to secure the one against the violation of his own obligation or of an independent existing obligation, of the third person is without consideration and void.⁹ A bond given by a contractor to deliver the building free from all liens, will not be construed to prevent him

³ In an action on the bond it is immaterial what interest in the land the nominal obligee in the bond may have. The obligors cannot be permitted to allege want of title to the land in such nominal obligee, for the purpose of defeating those who, on the security of the bond, have furnished material for and done labor on the work referred to in it. It is enough for them that the bond is executed by the contractor (with sureties) to the person who as owner has contracted to have the building constructed. *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302.

⁴ *Shaughnessy v. American*

Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

⁵ *Mangrum v. Truesdale*, 128 Cal. 145, 60 Pac. 775.

⁶ *Lichtentag v. Feitel*, 113 La. 931, 37 So. 880.

⁷ *Oberbeck v. Mayer*, 59 Mo. App. 289.

⁸ *Fullerton Lumber Co. v. Calhoun* 89 Mo. App. 209.

⁹ A bond is nudum pactum whose sole purpose and consideration is to indemnify the obligee for the performance of his own legal obligation: or whose sole consideration is a payment made by the obligee to a third person in discharge of an existing legal obligation. *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195.

from filing a lien to secure himself.¹⁰ Nor will the taking of an indemnity bond compel the owner to hold the money for subcontractors or to pay the contractor in any other way than is provided in the original contract.¹¹ All such bonds are usually construed strictly and held to cover only matters coming plainly within their terms.¹² As a general rule, however, they will include all labor and materials essential to a substantial performance of the original contract.¹³ The mere fact that all did not sign the bond that those signing believed would sign, will not release the signers, unless the party receiving the bond knew that they signed with the understanding that the others would sign.¹⁴

§ 170. **Indemnity bond—Liability.**—As a general rule, in action on these bonds, the liability of the principal to the owner is not brought in question. This is true for the reason that if the contractor is responsible, action will be brought directly against him and not against others that may be on the bond. And so the question most frequently brought up in such bonds is how sureties are affected thereon, and for reason that the surety has received no particular benefit, and it is always more or less of a hardship to compel him to pay anything thereon, the courts have held that the surety is not liable

¹⁰ *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352.

¹¹ *Slagle v. De Gooyer*, 115 Iowa 401, 88 N. W. 932.

¹² A contract between a builder and a mechanic required the latter, in consideration of a specified sum of money, to erect, finish, and deliver, on a date mentioned, certain buildings, according to given plans and specifications; and the obligation of sureties was that the mechanic would fulfill in every particular the contract, and deliver the build-

ings at the time required, properly completed. This obligation did not impose the duty of indemnifying the builder against liens for work done and material furnished in the construction of the building. *Gato v. Warrington*, 37 Fla. 542, 19 So. 833.

¹³ *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41; *King v. Downey*, 24 Ind. App. 262, 56 N. E. 680.

¹⁴ *Slack v. Cresswell*, 2 Montg. Co. L. (Pa.) 145.

unless within the "letter of the bond."¹ Therefore it is held that a surety is not liable where the person asserting the claim has no debt or demand which the law recognizes as a debt or claim against the beneficiary of the bond,² nor can there be a liability where the claim is for materials, that can not become a lien charge.³ Neither is the surety responsible where the breach complained of is not the same as that mentioned in the bond,⁴ nor if the beneficiary has not complied with his part of the contract.⁵ As a general rule, the owner cannot recover unless he was obliged to pay the debt to relieve his property

¹ *Bell v. Paul*, 35 Neb. 240, 52 N. W. 1110; *McRae v. University of the South*, (Tenn. Ch. App.), 52 S. W. 463; *Wilson v. Davidson County*, 3 Tenn. Ch. 536. See Dec. & Am. Dig. tit. Mechanics' Liens, § 315.

² *Hunt v. King*, 97 Iowa 88, 66 N. W. 71.

³ *Marquette Opera House Bldg. Co. v. Wilson*, 109 Mich. 223, 67 N. W. 123. It is no defense to an action on a building contractor's bond to a railroad company against liens for material that a portion of the material was used in constructing a hotel, the hotel being a part of a depot which he built. *Heery v. Mott Iron-Works Co.*, 62 Pac. 904, 10 Kan. App. 579 (without opinion).

⁴ *Holcombe v. Mattson*, 50 Minn. 324, 52 N. W. 857; *Hurst v. Randall*, 68 Mo. App. 507. Sureties are released by a departure from the terms of the contract in respect to plan and materials. *Erickson v. Brandt*, 53 Minn. 10, 55 N. W. 62.

Attorney fees.—The contractor gave bond to indemnify the owner against any counsel fees which

might be incurred in defending against lien claims of subcontractors. The owner withheld his consent to a payment of a subcontractor, and advised the contractor to contest the claim. The latter paid his own counsel fees in the ensuing litigation. The owner could not recover on the bond for counsel fees paid on his own behalf in the same litigation. *Hoyt v. Greene*, 33 Mo. App. 205.

⁵ *Herrell v. Donovan*, 7 App. Cas. (D. C.) 322; *Queal v. Stradley*, 117 Iowa 748, 90 N. W. 588; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash. 268, 69 Pac. 784. Payment to H. of proper amounts, but at intervals somewhat different from that specified in the contract, was immaterial. *Robinson v. Hagenkamp*, 52 Minn. 101, 53 N. W. 813. A covenant in a bond to secure the pay and keep it harmless from all liens and claims of liens is a contract of indemnity, and is not violated by simply permitting liens to be filed. It will only be broken when pay was actually damaged

of the lien,⁶ or must do something to free himself from a legal liability.⁷ However, he need not wait until judgment is recovered or even until liens are filed, if they are of such a character that they may be filed and the contractor refuses to pay the same.⁸ Of course if he paid such claims when there was no legal demand for the same, he will fail in an action on the bond.⁹ Especially will this be true if the original contract shows a valid defense.¹⁰ But it will be no defense to the surety that the principal is a corporation which has no legal existence,¹¹ or that there is an action pending by lien claimants to recover a personal judgment,¹² or that the contractor has a partner, the surety not making objection when it became known,¹³ or that the contract was void by reason of not

by reason of liens or claims of liens. *Carson Opera House Assn. v. Miller*, 16 Nev. 327.

⁶ *Cassan v. Maxwell*, 39 Minn. 391, 40 N. W. 357; *Price v. Doyle*, 34 Minn. 400, 26 N. W. 14; *Spo-kane, &c., Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119. *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861. The existence of unpaid claims against the contractors which might in due time be enforced against the building was not in itself a violation of the indemnity clause in the contract. It is not claimed that any liens had been filed, or any legal proceedings taken to enforce the same, or that he might not have been saved harmless if he has himself stood by and insisted on the terms of the contract. *Weller v. Eames*, 15 Minn. 461; *Price v. Doyle*, 34 Minn. 400, 26 N. W. 14.

⁷ *Hawkins v. Mapes-Reeves*

Const. Co., 82 App. Div. (N. Y.) 72, 81 N. Y. Supp. 794.

⁸ *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974; *Oberbeck v. Mayer*, 59 Mo. App. 289; *Klewit v. Carter*, 25 Neb. 460, 41 N. W. 286. Under the conditions of some bonds, the filing of a lien will not be a breach of the bond. *Carson Opera House Assn. v. Miller*, 16 Nev. 327; *Northern Light Lodge v. Kennedy*, 7 N. Dak. 146, 73 N. W. 524.

⁹ *Brill v. De Turk*, 130 Cal. 241, 62 Pac. 462; *Winfield v. Paulus, &c., Architectural Co.*, 68 Mo. App. 194.

¹⁰ *Brill v. De Turk*, 130 Cal. 241, 62 Pac. 462.

¹¹ *Jefferson v. McCarthy*, 44 Minn. 26, 46 N. W. 140.

¹² *Robinson v. Hagenkamp*, 53 Minn. 101, 53 N. W. 813.

¹³ *Crowley v. United States Fidelity, &c., Co.*, 29 Wash. 268, 69 Pac. 784.

being filed as the statute required.¹⁴ Likewise the owner will fail if he paid to the principal contractor otherwise than according to the principal contract.¹⁵ As a matter of course, only those for whose benefit a bond is made may bring an action thereon.¹⁶ The limit of recovery is the penalty of the bond.¹⁷ If the bond is given to secure performance of a contract, it is a violation of it if not performed within the stipulated time.¹⁸

§ 171. Indemnity bond—Estoppel of surety—Retention of money.—A surety on a bond to indemnify the owner, in order to prevent a circuity of actions, has no right to file a lien to secure himself for the materials furnished.¹ If the statute

¹⁴ *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109. The earlier decisions of *Schallert-Ganahl Lumber Co. v. Neal*, 90 Cal. 213, 27 Pac. 192, held to the contrary. *Summerton v. Hanson*, 117 Cal. 252, 49 Pac. 135.

¹⁵ *Carson Opera House Assn. v. Miller*, 16 Nev. 327.

¹⁶ *Pickle Marble, &c., Co. v. McClay*, 54 Neb. 661, 74 N. W. 1062; *Pioneer Fire-Proof & Const. Co. v. McClay*, 54 Neb. 663, 74 N. W. 1063.

Cannot be deprived of right by Owner.—Where a bond is given to secure the performance of the conditions of a contract for the erection of a building, the obligation running to the owner, specifically naming him and all other persons who may be injured by any breach of the conditions, a subcontractor injured by a breach of the contract cannot be deprived of his right to recover on the bond by an act of the owner. *Getchell, &c., Lumber &*

Mfg. Co. v. Peterson, (Iowa) 100 N. W. 550.

¹⁷ *Getchell, &c., Lumber & Mfg. Co. v. Peterson*, (Iowa), 100 N. W. 550; *Beardsley v. Brown*, 71 Ill. App. 199. In no amount if the obligation of the bond is not in fact broken. *Hurst v. Randall*, 68 Mo. App. 507.

¹⁸ *Getchell, &c., Lumber & Mfg. Co. v. Peterson*, (Iowa), 100 N. W. 550; *Pierson v. Jackman*, 47 App. Div. (N. Y.) 625, 62 N. Y. Supp. 1145.

¹ **California.**—*Blyth v. Torre*, (Cal.) 38 Pac. 639; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904.

Indiana.—*Closson v. Billman*, 161 Ind. 610, 69 N. E. 449; *McHenry v. Knickerbacker*, 128 Ind. 77, 27 N. E. 430.

Pennsylvania.—*Rynd v. Pittsburgh Natatorium*, 173 Pa. St. 237, 33 Atl. 1041, 37 W. N. C. (Pa.) 551; *Given v. German Evangelical Reformed Church*, 15 Phila. (Pa.) 300; *Haine v. Dambach*, 4 Pa. Co. Ct. 633.

requires the contract and bond to be filed and it is void for not being filed as the statute requires, then the surety will not be precluded from filing or asserting his lien claim rights.² If the bond is valid, however, the extent of the liability thereon is controlled by the provisions of the original contract.³ If the owner sells the property without transferring his right under the bond the surety may set up his lien, but in such case the original owner may set up his bond as a counterclaim and perhaps enjoin collection of the surety's lien until paid.⁴ Where the surety assumes the duties of the principal contractor he will be held to the responsibility attaching to the contractor's position.⁵ It is not an unusual thing where work is done upon buildings belonging to public corporations that provision is made either by contract or by statute, that the corporation retain sufficient money to meet the claims of all sub-contractors.⁶ In such cases, the material man has a right of

Washington.—*Spears v. Lawrence*, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. 789.

Wisconsin.—*Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833. Where a building contract provides as a condition precedent to the final payment that there shall be no legal claims against the contractor for work or materials furnished, a surety on the bond of the contractor cannot enforce a lien for work or materials. *Gannon v. Central Presbyterian Church*, 173 Pa. St. 243, 33 Atl. 1043, 37 W. N. C. (Pa.) 553. See §§ 49, 185.

² The contract being void, no cause of action can be based upon it by either party. The bond was attached to the contract, and its conditions based upon it, and when the contract fell, the bond was left without support and nec-

essarily fell with it. *Schallert-Ganahl Lumber Co. v. Neal*, 90 Cal. 213, 27 Pac. 192.

³ *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512.

⁴ *Hartman v. Berry*, 56 Mo. 487; *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299n.

⁵ *Robinson v. Hagenkamp*, 52 Minn. 101, 53 N. W. 813.

⁶ Provision in a building contract that 20 per cent. of the contract price shall not be payable till all the mechanics and material men "shall have, in writing, acknowledged that they have been fully paid by the contractors for his work and materials" is for the benefit, not of the sub-contractors, but the owner, though the contract contains an express waiver of right to file liens. *Getty v. Pennsylvania Inst. for In-*

action directly against the corporation.⁷ Where the contract provides that the contractor should keep the building free from liens, and all liens have been paid, the balance may be recovered by the contractor on his original contract.⁸

§ 172. **Indemnity bond—Action on.**—An action on an indemnity bond is one at law, regulated in most of the states by the code of civil procedure, and the petition must contain the necessary averments to sustain the cause of action.¹ In an action by a subcontractor against the sureties on the contractor's bond, it is not necessary to set out the terms of the principal contract, unless this contract constitutes a necessary element in the recovery on the bond.² If the bond is made to the owner and all persons who may be injured by any breach thereof, this will inure to the benefit of subcontractors and they may maintain an action if their claim should not be paid.³ In actions on bonds the defendant may show whatever defense he may have,⁴ but cannot complain of the result of his own acts.⁵ If the plaintiff should recover, he may include the inter-

struction of Blind, 194 Pa. St. 571, 45 Atl. 333.

⁷ Nash v. Commonwealth, 174 Mass. 335, 54 N. E. 865.

⁸ Henry v. Hand, 36 Ore. 492, 59 Pac. 330; Nash v. Commonwealth, 174 Mass. 335, 54 N. E. 865; Getty v. Pennsylvania Inst. for Instruction of Blind, 194 Pa. St. 571, 45 Atl. 333.

¹ Standiford v. Shideler, 26 Ind. App. 496, 60 N. E. 168; Glencoe Lime, &c., Co. v. Wind, 86 Mo. App. 163. See Dec. & Am. Dig. tit. Mechanics' Liens, § 317.

² Conn v. State, 125 Ind. 514, 25 N. E. 443.

³ Getchell, &c., Lumber & Mfg. Co. v. Peterson, (Iowa), 100 N. W. 550; Jones Lumber Co. v. Ville-

gas, 8 Tex. Civ. App. 669, 28 S. W. 558.

⁴ Ernst v. Cummings, 55 Cal. 179; Foster v. Gaston, 123 Ind. 96, 23 N. E. 1092; Brink v. Bartlett, 105 La. 336, 29 So. 958.

No defense.—On an action against a surety for a breach of the bond, the fact that the plaintiff, during the work, made payments to the contractor exceeding 85 per cent. of the total amount of the materials and labor already furnished, did not constitute a defense. Graves v. Merrill, 67 Minn. 463, 70 N. W. 562. Contractor may plead that owner owes him. Wagner v. Ditte, 2 Mo. App. 254.

⁵ That it was subsequent in

est.⁶ Under a statute providing that "persons severally liable upon the same obligation or instrument, may all or any of them be included in the same action," in an action on a bond conditioned that the contractor shall pay all claims, plaintiff may join all or one, as they are jointly and severally liable.⁷ Under the laws of Minnesota, Gen. St. 1878, a subcontractor may bring his action on the bond without taking the steps necessary to secure a lien on the property.⁸ Before the sureties may recover from the principal, it is not necessary that they should have previously paid the full amount of the penalty named in the bond, nor show that a notice was put up on the premises where the statute requires that, or that the original contractor has fully performed his contract.⁹

point of date of the loan and the mortgage is immaterial. The plaintiff has a right to take, and the defendant the right to give, additional security; and the appellant had the right to put himself in the breach as a surety. He has done so, and has no cause to complain that he is now called upon to make his engagement good. *Union Bldg. & Loan Assn. v. Hull*, 135 Pa. St. 565, 19 Atl. 949.

⁶ *McFall v. Dempsey*, 43 Mo. App. 369.

⁷ *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302.

⁸ *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127.

⁹ *St. Paul Foundry Co. v. Wegmann*, 40 Minn. 419, 42 N. W. 288. The measure of damages will be the price agreed on between the sub-contractor and the contractor.

Prima facie evidence.—A statement of accounts rendered by the contractor to the plaintiffs is admissible in evidence in favor of plaintiffs, in an action on a bond given by the contractor for the protection of the property against liens, when followed by an instruction to the jury that it is only prima facie evidence as against the surety. *Foster v. Gaston*, 123 Ind. 96, 23 N. E. 1092.

CHAPTER 6.

ANNULMENT OR AVOIDANCE OF LIEN OR RIGHT TO A LIEN.

- | Sec. | Sec. |
|---|--|
| 173. Waiver of right. | 185. Waiver—Action on such bond. |
| 174. Express waiver—Recovery of judgment on debt—Execution. | 186. Loss of lien by attending circumstances. |
| 175. Implied waiver. | 187. Loss by transfer of title. |
| 176. Waiver, by taking note. | 188. Loss by sale, delay and merger. |
| 177. Waiver—Maturity of note as affecting. | 189. Loss or extinguishment of lien by release. |
| 178. Waiver—Taking collateral security. | 190. Loss or extinguishment of lien—Discharge in bankruptcy. |
| 179. Waiver by taking collateral—Cash deposit—Mortgage. | 191. Loss by payment of debt. |
| 180. Waiver by estoppel. | 192. Loss by payment of debt—Subrogation. |
| 181. Waiver as affecting subcontractors. | 193. Failure to satisfy lien—Ohio statute. |
| 182. Waiver by taking bond or deposit. | 194. Application of payments made on debt. |
| 183. Waiver by deposit—Effect and operation of. | 195. Payment to subcontractor affecting lien rights. |
| 184. Waiver—Liability on bond made to release lien. | |

§ 173. **Waiver of right.**—The right to a lien may be waived by the parties themselves in a number of ways; by express agreement not to take a lien, or by a bond that no lien should be filed, or by payment of the debt, and matters of that character. There is nothing in the nature of a mechanic's lien that will prevent the mechanic from waiving his right.¹

¹ Kilpatrick v. Kansas City, &c., R. Co., 38 Neb. 620; Matthews v. Young, 40 N. Y. Supp. 27; Davis v. La Crosse Hospital Assn., 121 Wis. 579, 99 N. W. 351. A party cannot be heard to object to the

execution of a contract made in his favor. Healy v. Wayne Title & Trust Co., 19 Pa. Super. Ct. 371. In order to waive by contract the right to a mechanic's lien, there must be an express

The right to a mechanic's lien may be waived or relinquished by not relying on the credit of the building for payment of the claim.² And the extent of the waiver so far as it may affect subcontractors is determined by the contract of the principal contractor, modified somewhat by statutory regulations in the different states.³ When a mechanic has furnished material or labor coming within the terms of the statute, it will be presumed that he intends to avail himself of the beneficial provisions of the statute.⁴ But as a matter of course if he specifically binds himself not to take the benefits of the statute he will be estopped to assert to the contrary.⁵ If the mechanic should be prevented from fulfilling his contract, there will be no presumption from this fact that he did not wish a lien.⁶ If the agreement not to claim a lien has become fully executed, the mechanic is bound.⁷ A stipulation in the principal contract that no subcontractor should file a lien, will not be a waiver of the right of a contractor

covenant resulting by implication from the language used so plain that a mechanic can so understand without seeking a professional interpretation as to its legal effect. *Concord Apartment House Co. v. O'Brien*, 128 Ill. App. 437, decree affirmed, 228 Ill. 476, 81 N. E. 1076.

² See § 21. See Dec. & Am. Dig. tit. Mechanics' Liens, § 207.

³ See § 57.

⁴ *McLaughlin v. Reinhart*, 54 Md. 71; *Matthews v. Young*, 18 Misc. (N. Y.) 525, 40 N. Y. Supp. 26.

⁵ *Knowles v. Baldwin*, 125 Cal. 224, 57 Pac. 988; *Sanders' Pressed-Brick Co. v. Barr*, 76 Mo. App. 380; *Long v. Caffrey*, 93 Pa. St. 526; *Dwyer v. Salt Lake City Copper Mfg. Co.*, 14 Utah

339, 47 Pac. 311. Such as looking exclusively to the contractor. *Isenman v. Fugate*, 36 Mo. App. 166. Written release. *Hughes v. Lansing*, 34 Ore. 118, 55 Pac. 95. Not to file a claim within period allowed by law. *Scheld v. Rapp*, 121 Pa. 593, 15 Atl. 652. Or to look to someone else for his pay. *Murray v. Earle*, 13 S. Car. 87. Where a building contract provides that the time of payment is later than the time within which the lien could be filed, it is waived. *Ritchie v. Grundy*, 7 Man. L. R. 532.

⁶ *Lydick v. Anderson*, 188 Pa. St. 600, 41 Atl. 729.

⁷ *Irish v. Pulliam*, 32 Neb. 24, 48 N. W. 963; *Gordon v. Fulmer*, 21 Pa. Co. Ct. 93, 7 Pa. Dist. 368, 28 Pittsb. Leg. J. (Pa.) 317.

filing a lien to protect himself.⁸ And so a general provision that he is to deliver the buildings free from liens is not a waiver of his own right.⁹ The provision not to claim a lien is generally considered as a part of the contract, separate and independent of the payments made under the contract, and the failure to pay as stipulated will not affect the agreement not to claim a lien.¹⁰ So it is held that the fact that the contractor has agreed not to file a lien will not prevent him from purchasing the lien of another and enforcing it.¹¹ Under statutes which for cause permit liens to be struck from the files, such procedure is not permitted merely because the contractor has agreed not to file his lien.¹²

§ 174. Express waiver—Recovery of judgment on debt—Execution.—Waivers of this right are principally of two kinds, express and implied. A stipulation that for a consideration, the contractor releases and waives all liens or rights to a lien is an express waiver.¹ And so also an agree-

⁸ A waiver of the right to a mechanic's lien, to be effective, must be either express or must appear from necessary implication. It should be so plain that every mechanic or material man though of limited education, can understand it at a glance, and not be compelled to submit its interpretation to a lawyer. *Commonwealth Title Ins. & Trust Co. v. Ellis*, 5 Pa. Dist. 33.

⁹ *Davis v. La Crosse Hospital Assn.*, 121 Wis. 579, 99 N. W. 351.

¹⁰ *Purvis v. Brumbaugh's Estate*, 8 Pa. Super. Ct. 292; *Brazinski v. Neeves*, 93 Wis. 567, 67 N. W. 1125.

¹¹ *Hines v. Cochran*, 44 Neb. 12, 62 N. W. 299.

¹² *Connell v. Ker*, 17 Lanc. Law Rev. (Pa.) 206, 9 Pa. Dist. 145;

Ludowici Roofing Tile Co. v. Pennsylvania Inst. for Blind, 116 Fed. 661.

¹ *Connecticut*.—*Weinberg v. Valente*, 79 Conn. 247, 64 Atl. 337.

Illinois.—*Dymond v. Bruhns*, 101 Ill. App. 425.

Maryland.—*Pinning v. Skipper*, 71 Md. 347, 18 Atl. 659.

New Jersey.—*Manhattan, &c., Assn. of New York v. Massarelli* (N. J. Eq.), 42 Atl. 284.

Pennsylvania.—*Stoneback v. Waters*, 198 Pa. 459, 48 Atl. 296. *Carle v. Neeld*, 10 Kulp (Pa.) 101, 18 Lanc. Law (Pa.) 46, 7 North Co. Pa. 324, 24 Pa. Co. Ct. 223; *Purvis v. Brumbaugh's Estate*, 8 Pa. Super. Ct. 292. Where the printed and written portions of a contract are repugnant to each other, the printed form must yield to the

ment to look entirely to the personal credit of the debtor, or any other person, is an express waiver.² Such agreements are always to be applied, and taken into consideration with the principal contract then in mind,³ but it is not necessary that the principal contract be then executed or in execution.⁴ An agreement containing a waiver of priority to submit the matter to an arbitration is not binding if the proceedings on the lien are commenced before the award is made.⁵ But it should be remembered that the debt and the lien are two separate things, and that a recovery of a personal judgment on the debt will not necessarily be a waiver of the lien.⁶ Of course if the debt is paid by collection of the judgment or otherwise, the lien is satisfied.⁷ Under some statutes a decree of foreclosure on the lien can not be had until the judgment is returned "unsatisfied."⁸ Generally it is no defense that in a

deliberate written expression. *Commonwealth Title-Insurance & Trust Co. v. Ellis*, 192 Pa. St. 321, 43 Atl. 1034; 44 W. N. C. (Pa.) 427. See Dec. & Am. Dig. tit. Mechanics' Liens, § 208.

² *Balley v. Adams*, 14 Wend. (N. Y.) 201.

³ *Lee v. Hassett*, 39 Mo. App. 67.

⁴ *Bush Co. v. Barr*, 76 Mo. App. 380. A party may waive in advance the benefits of the mechanic's lien law. *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612.

⁵ *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532.

⁶ *Arkansas*.—*Spence v. Etter*, 8 Ark. 69.

California.—*Germania Building & Loan Assn. v. Wagner*, 61 Cal. 349.

Colorado.—*Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395.

Michigan.—*Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. 549.

New Jersey.—*Anderson v. Huff*, 49 N. J. Eq. 349, 23 Atl. 654; *Vandynne v. Vanness*, 5 N. J. Eq. 485.

Pennsylvania.—*Cream v. McFee*, 2 Miles, (Pa.) 214.

West Virginia.—*United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

⁷ Taking judgment with knowledge of facts releasing lien will estop a recovery on lien. *Carey-Lombard Lumber Co. v. Burnet*, 68 Ill. App. 475. Non-lienable and lienable items blended. *Lambard v. Pike*, 33 Me. 141. See also *Gambling v. Haight*, 59 N. Y. 354.

⁸ *Barbig v. Kick*, 25 Civ. Proc. (N. Y.) 62, 35 N. Y. Supp. 676; *Dutton v. Herman*, 22 Mo. App. 458; *Contra, Parmelee v. Tennes-*

previous suit for the same debt, the property has been attached.⁹

§ 175. **Implied waiver.**—An implied waiver will not be presumed; the intention to waive must be made clear and evident,¹ from all circumstances in the case.² Making a new contract,³ accepting inconsistent security for claim,⁴ a submission to arbitration,⁵ an inseparable blending of lienable and non-lienable items,⁶ an acceptance of other property as payment of the claim,⁷ and a failure to preserve the lien as pro-

see, &c., R. Co., 81 Tenn. 600. If the property is misdescribed, another action may be maintained giving the correct description. *Gray v. Dunham*, 50 Iowa 170. An accepted account by an assignee will permit a judgment on a lien. *Hayden Slate Co. v. National Cornice & Iron Co.*, 62 Mo. App. 569, 1 Mo. App. Rep'r, 567.

⁹ *Angier v. Bay State Distilling Co.*, 178 Mass. 163, 59 N. E. 630. The remedies by cumulation. *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507. An old case holds the contrary. *Kirk v. Talliaferro*, 16 Miss. 754.

¹ *Peck v. Bridwell*, 10 Mo. App. 524; *Harris v. Youngstown Bridge Co.*, 93 Fed. 355, 35 C. C. A. 341. Within the scope of the principal contract the contractor is agent of the owner. *Taylor v. Dall Lead & Zinc Co.*, 131 Wis. 348, 111 N. W. 490.

² *Portsmouth Iron Co. v. Murray*, 38 Ohio St. 323. See Dec. & Am. Dig. tit. Mechanics' Liens, § 209.

³ *Whitney v. Joslin*, 108 Mass. 103.

⁴ *Southwark Mortar Co. v. Cas-sell*, 15 Pa. Super. Ct. 330; *Kent Lumber Co. v. Ward*, 37 Wash. 60, 79 Pac. 485; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229. Defendant agreed to build certain houses for plaintiff for a certain amount each; the latter agreeing to pay one-half when a certain portion was completed, and the balance was entirely finished. Not inconsistent. *Osborne v. Barnes*, 179 Mass. 597, 61 N. E. 276.

⁵ See § 174. *New York Lumber & Wood-working Co. v. Schneider*, 15 Daly, (N. Y.) 15, 1 N. Y. Supp. 441, 15 Civ. Proc. (N. Y.) 30. If, as a matter of law, the submission of a claim to arbitration operates as a waiver of the claim for a lien, the fact that such award was set aside does not change the legal effect of the act of submission. *Shields v. Sorg*, 129 Ill. App. 266, judgment affirmed. *Sorg v. Crandall*, 233 Ill. 79, 84 N. W. 181.

⁶ *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36.

⁷ *Garrett v. Adams*, (Tenn.) 39

vided by law, constitute waivers of the lien right.⁸ But an unexecuted agreement to take a mortgage,⁹ or bonds,¹⁰ or security on the same property,¹¹ or an instruction by a lienor to pay his wages to another, which is not acted upon,¹² or a stipulation in the contract that the final payment shall only be made when the evidence shows that all claims are paid,¹³ or a stipulation that the title shall remain in the vendor until paid for,¹⁴ or the unauthorized act of an agent in signing an obligation for the faithful performance of the contract,¹⁵ or the acceptance of drafts by the debtor,¹⁶ or a mere promise to make payments in a certain way, have been held not to constitute waivers.¹⁷ If proceedings are brought to foreclose the property, and the lienor interpleads and demands that his claim be paid out of the fund, this will annul his lien on the property and transfer his right to the fund,¹⁸ the general rule being that a lienor is not affected by the proceedings in court unless he has been made a party.¹⁹ An extension of

S. W. 730.

⁸ *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863; *Consolidated Engineering Co. v. Crowley*, 105 La. 605, 30 So. 222.

⁹ *Barnard & Leas Mfg. Co. v. Galloway*, 5 S. Dak. 205, 58 N. W. 565.

¹⁰ *Baumhoff v. St. Louis, &c., R. Co.*, 171 Mo. 120, 71 S. W. 156; *Bickel v. James*, 7 Watts (Pa.) 9.

¹¹ See § 176. *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 779.

¹² *Dowd v. Dowd*, 126 Mich. 649, 86 N. W. 128, 8 Det. Leg. N. 196.

¹³ *Poirer v. Desmond*, 177 Mass. 201, 58 N. E. 684; *Seeman v. Bie-mann*, 108 Wis. 365, 84 N. W. 490.

¹⁴ *Salt Lake Hardware Co. v. Chainman Mining & Electric Co.*, 128 Fed. 509; *Hooven, Owens &*

Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81, 49 C. A. 229, also 99 Fed. 180; *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003 (conditional sale.)

¹⁵ *Bullard v. De Groff*, 59 Neb. 783, 82 N. W. 4.

¹⁶ *Bradford Neill & Mahnke Const. Co.*, 76 Ill. App. 488; *Beach v. Wakefield*, 107 Iowa 567, 76 N. W. 688.

¹⁷ *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

¹⁸ *Idaho Gold Min. Co. v. Winchell*, 6 Idaho 729, 56 Pac. 533.

¹⁹ **Forbearance to bring suit.**—An agreement by the holder of a mechanic's lien, with a person claiming a mechanic's lien on the same property, that in consideration of the latter forbearing to bring suit to foreclose his lien, it

time of payment will not ordinarily constitute a waiver of the lien,²⁰ unless it extends beyond the time limit for filing a lien.²¹ An unexecuted agreement or extension will in no case amount to a waiver.²²

§ 176. **Waiver, by taking note.**—Some few courts have held that the taking of a note operates as a payment of the debt and waives the lien.¹ But the great weight of authority now is, that the taking of a note is neither a waiver of the lien nor a payment of the debt,² unless it is expressly

shall be prior to that of the former, concedes the validity of the latter lien, and estops the holder of the former from thereafter attaching it. *Cain v. Texas Building & Loan Assn.*, 21 Texas Civ. App. 61, 51 S. W. 879; *Elwell v. Morrow*, 28 Utah 278, 78 Pac. 605.

Praying in Alternative.—The holder of a claim for material used in a building whose lien was duly registered did not waive his right to a privilege by praying, in the alternative, that his material be separately appraised, and, if he was not allowed the privilege, that he be given a vendor's lien on such material. *Fudickar v. Monroe Athletic Club*, 49 La. Ann. 1457, 22 So. 381.

²⁰ *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Stout v. Sower*, 22 Ill. App. 65; *Chisholm v. Randolph*, 21 Ill. App. 312.

²¹ See § 177.

²² Mortgage not given. *Gardner v. Hall*, 29 Ill. 277. The fact that the contract extended the time of payment beyond a year from the time the work was done

does not prevent a mechanic's lien from attaching, where that extension was conditional upon the giving of a note and securing it by a mortgage, which was never done. *Cunningham v. Fisher*, (Ky.) 48 S. W. 993. Note not given. *Globe Light & Heat Co. v. Doud*, 47 Mo. App. 439; *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. ed. 961. Note not delivered. *Lutz v. Ey*, 3 E. D. Smith, 621, 3 Abb. Pr. (N. Y.) 475.

¹ *Belmont Farm v. Dobbs Hardware Co.*, 124 Ga. 827, 53 S. E. 312; *Johns v. Bolton*, 12 Pa. 339; *Hill v. Witmer*, 2 Phila. (Pa.) 72; *Edmonds v. Tiernan*, 21 S. C. R. (Canada) 406. Where a material man, after furnishing lumber and mill work for a house, takes the owner's note with a third person as surety, he thereby waives his right to a mechanic's lien. *Lyon & Sons Manufg. Co. v. Equitable Loan & Investment Assn.*, 174 Ill. 31, 50 N. E. 1006. See Dec. & Am. Dig. tit. Mechanics' Liens, § 211 See ante, § 175.

² *Connecticut*.—*Hopkins v. Forrester*, 39 Conn. 351.

agreed that it shall have that effect,³ or there is a manifest intention that it shall so operate.⁴ Some statutes have especially provided that the taking of a promissory note shall not be taken as a waiver of the lien, and it is held that even if a receipt in full is given, that unless the note is paid it

Illinois.—Kendall v. Fader, 199 Ill. 294, 65 N. E. 318; Brady v. Anderson, 24 Ill. 110.

Iowa.—Logan v. Attix, 7 Iowa 77; Scott v. Ward, 4 G. Greene (Iowa) 112.

Kentucky.—Gere v. Cushing, 5 Bush. (Ky.) 304; Laviolette v. Redding, 4 B. Mon. (Ky.) 81; Mivelaz v. Johnson, 124 Ky. 251, 98 S. W. 1020, 30 Ky. L. 389.

Louisiana.—Turpin v. His Creditors, 9 Mart. (O. S.) 562.

Minnesota.—Milwain v. Sanford, 3 Minn. 147.

Nebraska.—Livesey v. Hamilton, 47 Neb. 644, 66 N. W. 644; Barnacle v. Henderson, 42 Neb. 169, 60 N. W. 382.

New York.—Linneman v. Bieber, 85 Hun (N. Y.) 477, 33 N. Y. Supp. 129; Jones v. Moores, 67 Hun (N. Y.) 109, 22 N. Y. Supp. 53; B. Keogh Mfg. Co. v. Elsenberg, 7 Misc. (N. Y.) 79, 27 N. Y. Supp. 356.

Ohio.—Victoria Bldg. Assn. v. Kelsey, 9 Ohio Dec. 123, 11 Wkly. L. Bull. 38.

Pennsylvania.—Odd Fellows' Hall v. Masser, 24 Pa. 507, 64 Am. Dec. 675; Rush v. Fisher, 8 Phila. (Pa.) 44; Kinsley v. Buchanan, 5 Watts, (Pa.) 118; Walter & Sons v. Powell, 13 Dist. (Pa.) 667.

³ **Georgia.**—Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312.

South Dakota.—Hill v. Alliance Bldg. Co., 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819.

Texas.—Jones v. White, 72 Tex. 316, 12 S. W. 179.

Utah.—Doane v. Clinton, 2 Utah 417.

Wisconsin.—Lentz v. Eimmermann, 119 Wis. 492, 97 N. W. 181.

⁴ **Alabama.**—Lane & Bodley Co. v. Jones, 79 Ala. 156; Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

Iowa.—Greene v. Ely, 2 G. Greene, (Iowa) 508.

Kentucky.—Gilbert v. Moody, 18 Ky. L. 312, 36 S. W. 523.

Maine.—Bryant v. Grady, 98 Me. 389, 57 Atl. 92.

Massachusetts.—McLean v. Wiley, 176 Mass. 233, 57 N. E. 347. The right to a materialman's lien is not waived by the acceptance of a note for the owner's indebtedness, with the understanding that the lienor shall hold the note until the owner can collect some money and make a payment on account, when it is to be surrendered; no payment having been made, and the note being produced for cancellation at the trial of the action to enforce the lien. Darlington Lumber Co. v. Harris, 107 Mo. App. 148, 80 S. W. 688.

will not waive the right to the lien.⁵ And even where the statute requires that the lien statement shall contain a description of the note, if any was given, this does not change the rule and make it constitute a waiver.⁶ As said before, if it is the intention of the parties that the note shall be in payment of the claim,⁷ and is received as such⁸ and in discharge of the debt, then as a matter of course the lien right is lost.⁹ But the mere taking of the note will not raise a presumption of the intention to waive the claim or the right to the lien.¹⁰ In order for the taking of a note to have the effect of a waiver, an intention to that effect must be clearly shown.¹¹

§ 177. **Waiver—Maturity of note as affecting.**—The time of the maturity of the note is not material, so long as the maturity is within the time limit in which the lien can be

⁵**District of Columbia.**—*Smith v. Johnson*, 2 MacArthur (D. C.) 481.

Indiana.—*Goble v. Gale*, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219.

Nebraska.—*Hoagland v. Lusk*, 33 Neb. 376, 50 N. W. 162, 29 Am. St. 485.

New York.—*Althause v. Warren*, 2 E. D. Smith (N. Y.) 657.

Rhode Island.—*Wheeler v. Schroeder*, 4 R. I. 383.

⁶*Bernsdorf v. Hardway*, 7 Ohio Cir. Ct. 378.

⁷*Bender v. Stettinius*, 10 Ohio Dec. 186, 19 W. L. Bull. 163; *Donovan v. Frazier*, 15 App. Div. (N. Y.) 521, 44 N. Y. Supp. 533.

⁸*Crooks v. Finney*, 39 Ohio St. 57.

⁹*Vason v. Bell*, 53 Ga. 416.

¹⁰*Meek v. Parker*, 63 Ark. 367, 38 S. W. 900; *Van Court v. Bush-*

nell, 21 Ill. 624; *East v. Ferguson*, 59 Ind. 169; *Hersh & Son v. Carmen*, 51 Neb. 784, 71 N. W. 713; *Smith v. Parsons*, 37 Neb. 677.

Contra, *Negotiable note*. *Teal v. Spangler*, 72 Ind. 380.

¹¹*Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257; *Wheeler v. Schroeder*, 4 R. I. 383.

Receipt in full.—A party having a builder's lien took notes for the amount of his claim, and gave a receipt as follows: "Received of P. & B. two notes (describing them) in full." Quaere, whether the lien was not discharged thereby. The court inclined to the opinion that, in the absence of proof that the receipt did not express the real understanding of the parties, it must be taken to mean that the notes were received in payment, and to be regarded

perfected.¹ If the note is not due until after the time has expired within which a lien claim can be filed or asserted, then it will necessarily act as a waiver of the lien right.² And this is true, even where the statute declares that the taking of the note shall not amount to a waiver of the lien.³ But the taking of such a note will not be a waiver if the contract expressly provides that the taking of the note is not intended as a waiver of the lien right.⁴ If some of the notes taken, mature within the time limit, and others do not, the lien right will not be waived especially as to the debt evidenced by the notes due within the time limit.⁵ The fact that the note is to bear interest, is not material on the

as discharging the lien. *Rose v. Persse & Brooks Paper Works*, 29 Conn. 256.

¹*Alabama*.—*Hines v. Chicago Bldg. & Mfg. Co.*, 115 Ala. 637, 22 So. 160; *Leftwich Lumber Co. v. Florence Mut. Bldg., Loan & Savings Assn.*, 104 Ala. 584, 18 So. 48.

Minnesota.—*McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195.

Mississippi.—*Ehlers v. Elder*, 51 Miss. 495.

Missouri.—*Kaufman-Wilkinson Lumber Co. v. Christophel*, 59 Mo. App. 80; *Ashdown v. Woods*, 31 Mo. 465; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611.

Nebraska.—*Smith & Son Co. v. Parsons*, 37 Neb. 677, 56 N. W. 326.

New Jersey.—*McPherson v. Walton*, 15 Stew. (N. J. Eq.) 282, 11 Atl. 21.

New York.—*Miller v. Moore*, 1 E. D. Smith (N. Y.) 739.

New Mexico.—*Mountain Electric Co. v. Miles*, 9 N. Mex. 512, 56 Pac. 284.

Ohio.—*Victoria Bldg. Assn. No. 2 v. Kelsey*, 9 Ohio Dec. 123, 11 Wkly. L. Bull. 38.

West Virginia.—*Bodley v. Denmead*, 1 W. Va. 249; *Cushwa v. Improvement, Loan & Building Assn.* 45 W. Va. 490, 32 S. E. 259.

Wisconsin.—*Schmidt v. Gilson*, 14 Wis. 339; *Bailey v. Hull*, 11 Wis. 302, 78 Am. Dec. 706. Even where new notes are given, etc. *Howe v. Hindred*, 42 Minn. 433, 44 N. W. 311. See Dec. & Am. Dig. tit Mechanics' Liens § 211.

²*Lane & Bodley Co. v. Jones*, 79 Ala. 156; *Quinby v. City of Wilmington*, 5 Houst. (Del.) 26; *Green v. Fox*, 7 Allen (Mass.) 85; *Kunkle v. Reeser*, 5 Ohio N. P. 401.

³*Flenniken v. Liscoe*, 64 Minn. 269, 66 N. W. 979.

⁴*Butler-Ryan Co. v. Silvey*, 70 Minn. 507, 73 N. W. 406.

⁵*Pryor v. White*, 16 B. Mon. (Ky.) 605; *Dey v. Anderson*, 39 N. J. L. 199.

question of waiver.⁶ And if the payee sells the note, this will not necessarily operate as a waiver, if he again acquires it,^{6a} or retains a liability thereon, within the time limit of filing the lien claim.⁷ Likewise if a forged note or bond is given, this being invalid will not affect the lien right.⁸ And this is true even where the payee at the time the notes are sold, credits the proceeds of the same on the account.⁹ But if the payee should bring an action on the lien, where a note has been given, it will be incumbent upon him to have the note in his possession or account for it at the time of trial or he will not be entitled to a decree.¹⁰ And if the note has

⁶Brady v. Anderson, 24 Ill. 110.

^{6a}Kansas.—Bashor v. Nordyke & Marmon Co., 25 Kan. 222.

Kentucky.—Graham v. Holt, 4 B. Mon. (Ky.) 61.

Ohio.—Standard Oil Co. v. Sowden, 55 Ohio St. 332, 45 N. E. 320.

West Virginia.—Cushwa v. Improvement, Loan & Building Assn., 45 W. Va. 490, 32 S. W. 259.

Federal.—Wisconsin Trust Co. v. Robinson & Cary Co., 68 Fed. 778, 15 OCA 668, 32 U. S. App. 435.

⁷Swain v. Barrow, 11 La. Ann. 547; Davis v. Parsons, 157 Mass. 584, 32 N. E. 1117; Milwain v. Sanford, 3 Minn. 147; Edwards v. Derrickson, 4 Dutch (N. J. Law) 39.

⁸Breed v. Gardner, 187 Mass. 300, 72 N. E. 983.

⁹Indiana.—Schneider v. Kolt-hoff, 59 Ind. 568.

Iowa.—German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314; Hawley v. Warde, 4 G. Greene, (Iowa) 36.

South Dakota.—Hill v. Alliance

Bldg. Co., 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819.

Federal.—Beers v. Knapp, 5 Ben (U. S.) 104, Fed. Cas. No. 1232. Some Indiana decisions seem to hold that where a negotiable note is taken and disposed of, the presumption is that it was taken in payment. East v. Ferguson, 59 Ind. 169.

¹⁰Arkansas.—Meek v. Parker, 63 Ark. 367, 38 S. W. 900.

Illinois.—Kankakee Coal Co. v. Crane Bros. Mfg. Co., 128 Ill. 627; Clement v. Newton, 78 Ill. 427; Bayard v. McGraw, 1 Ill. App. 134.

Iowa.—German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314.

Pennsylvania.—McDuffee v. Rea, 13 Pa. Co. Ct. (Pa.) 261.

Tennessee.—Garrett v. Adams, (Tenn.) 39 S. W. 730.

West Virginia.—Cushwa v. Improvement, Loan & Building Assn., 45 W. Va. 490, 32 S. E. 259. Where the statutes only allow the taking of the note to be a waiver when express agreement is shown, a decree may be given

been put in judgment, the payee must show that the judgment has not been satisfied.¹¹ The same rule is applied to subcontractors taking a note of the contractor. Generally the taking of such a note is not a waiver of the subcontractor's rights on his lien.¹² There is a waiver in all cases where the identity of the lien claim is gone.¹³

§ 178. **Waiver—Taking collateral security.**—Whether or not the taking of collateral security by the contractor will amount to a waiver of his lien is a question upon which the courts are not in accord. Quite a number hold that it will,¹ but it is believed that the weight of opinion is that unless there is a manifest intention between the parties that it shall so operate, this will not be equivalent to a waiver.² And

even though the note is not in court. *Blake v. Pitcher*, 46 Md. 453.

¹¹ *Teaz v. Chrystle*, 2 E. D. Smith, (N. Y.) 621, 12 Abb. Pr. (N. Y.) 109.

¹² *Illinois*.—*Meeks v. Sims*, 84 Ill. 422.

Louisiana.—*Whitla v. Taylor*, 6 La. Ann. 480.

Michigan.—*Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104, 72 N. W. 29.

Missouri.—*Western Brass Mfg. Co. v. Boyce*, 74 Mo. App. 343; *Compound Lumber Co. v. Fehlgammer Planing Mill Co.*, 59 Mo. App. 661.

New York.—*Bates v. Trustees of Masonic Hall & Asylum Fund*, 7 Misc. (N. Y.) 609, 27 N. Y. Supp. 951; *Moran v. Murray Hill Bank*, 26 Jones & S. 199, 9 N. Y. Supp. 715.

New Mexico.—*Mountain Electric Co. v. Miles*, 9 N. Mex. 512, 56 Pac. 284.

Ohio.—*Kunkle v. Reeser*, 5 Ohio N. P. 401. See ante, § 176.

¹³ *Schulenberg v. Robison*, 5 Mo. App. 561.

¹ *Illinois*.—*Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318; *Kinzey v. Thomas*, 28 Ill. 502; *Equitable Loan, &c., Assn. v. Lyon & Sons' Lumber, &c., Co.*, 72 Ill. App. 489.

Indiana.—*Farman v. Ratcliff*, Wills. (Ind.) 145.

Kentucky.—*Andrews v. Kentucky Citizens' Building & Loan Assn., Assignee*, 23 Ky. L. 2418, 67 S. W. 826. See Dec. & Am. Dig. tit. Mechanics' Liens, § 212.

² *Halsted & Harmount Co. v. Arick*, 76 Conn. 382, 56 Atl. 628; *Union Stock Yards State Bank v. Baker*, 42 Neb. 880, 61 N. W. 91; *McKeen v. Haseltine*, 46 Minn. 431.

especially is this true where the enforcement of the lien will not affect the vested rights of any one.³ But even the courts that hold that the taking of collateral security waives the lien, require that the security be actually given and that a mere agreement to give will not have the effect of a waiver.⁴ And they also hold that the security taken must be intended as collateral.⁵ An effort to secure a more specific and exclusive lien on the same property will not be considered as collateral.⁶ A waiver cannot be urged where the lienor is induced by the fraud of the debtor to take security which proves to be

³ *Bristol - Goodson Electric Light, &c., Co. v. Bristol Gas, Electric Light, &c., Co.*, 99 Tenn. 371, 42 S. W. 19; *Firth v. Rehfeldt*, 30 App. Div. (N. Y.) 326, 51 N. Y. Supp. 980, affirmed 164 N. Y. 588, 58 N. E. 1087.

⁴ *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728; *Firth v. Rehfeldt*, 30 App. Div. (N. Y.) 326, 51 N. Y. Supp. 980; affirmed, 164 N. Y. 588, 58 N. E. 1087; *Rokewitch v. Harrington*, 20 S. Dak. 375, 107 N. W. 207. Plaintiff furnished material for a house, relying on orders drawn in his favor by the owner upon defendant building and loan association, which orders were accepted by defendant's agent, conditioned upon defendant's making a loan on the property. Such loan was afterwards made, but defendant refused to pay the orders on the ground that the money had been paid to the owner. The defendant had no standing in equity to claim that plaintiff had waived his right to a mechanic's lien by accepting the independent security. *Southern Building & Loan*

Assn. v. Bean, Tex. Civ. App. 49 S. W. 910.

⁵ *Atlantic Trust Co. v. Carbondale Coal Co.*, 99 Iowa 234, 68 N. W. 697; *Tallaferro v. Stevenson*, 58 N. J. L. 165, 33 Atl. 383.

⁶ *What is collateral.*—"It only remains to inquire whether from the facts stated in the petition, and especially, in view of the promise alleged to have been made by Sherman, plaintiff waived his lien? We think not. A party who takes collateral security on the same contract, is not entitled to a mechanic's lien. Code, § 1009. This means either a separate obligation attached to the contract named, to guaranty its performance; or it may be the transfer of property or of other contracts, to insure the performance of the principal agreement. *Mervin v. Sherman*, 9 Iowa 331. Notes of a third person are "collateral security," within Comp. Laws, S. Dak. § 5468, providing that no person is entitled to a mechanic's lien who takes collateral security in the same contract. *Allis Co. v. Madison Electric Light, Heat &*

worthless.⁷ Some states have statutes providing that the taking of collateral security shall not operate as a waiver unless made so by express agreement.⁸ The retention by the seller of the title of materials until paid for is not a waiver of the lien rights.⁹ And as a general rule it may be said that the taking of a chattel mortgage on the materials will not be a waiver of the lien right,¹⁰ unless the surrounding circumstances are such that it is manifest that the material man has intended to abandon his lien right.¹¹ Of course if the taking of such collateral security will prevent the mechanic from enforcing his lien, as where the collateral is not enforceable until after the lien right has expired, then, of course, it will be considered as a waiver.

§ 179. **Waiver by taking collateral—Cash deposit—Mortgage.**—The acceptance of the note of a third person will not in itself be a waiver of the lien.¹ Neither will the indorsement,² or guaranty of the owner's note by a third person have that effect, according to the decision of at least

Power Co., 9 S. D. 459, 70 N. W. 650; Clark v. Moore, 64 Ill. 273.

⁷ Norton v. Hope Milling, Mining & Lumber Co., 19 Ky. L. 382, 40 S. W. 688.

⁸ Maryland Brick Co. v. Spillman, 76 Md. 337, 25 Atl. 297, 25 Am. St. 431, 17 L. R. A. 599.

⁹ Michigan.—Peninsular General Electric Co. v. Norris, 100 Mich. 496, 59 N. W. 151.

Nebraska.—Henry & Coatsworth Co. v. Fisherdict, 37 Neb. 207, 55 N. W. 643; Great Western Mfg. Co. v. Hunter, 15 Neb. 32, 16 N. W. 759.

Wisconsin.—Cooper v. Cleghorn, 50 Wis. 113, 6 N. W. 491.

Federal — Case Mfg. Co. v.

Smith, 40 Fed. 339, 5 L. R. A. 231.

¹⁰ Howe v. Kindred, 42 Minn. 433, 44 N. W. 311; Hoagland v. Lusk, 33 Neb. 376, 50 N. W. 162, 29 Am. St. 485.

¹¹ Kendall Mfg. Co. v. Rundle, 78 Wis. 150, 47 N. W. 364.

¹ Ford v. Wilson, 85 Ga. 109, 11 S. E. 559; St. Paul Labor Exch. Co. v. Eden, 48 Minn. 5, 50 N. W. 921; Howe v. Kindred, 42 Minn. 433, 44 N. W. 311; Concord Apartment House Co. v. O'Brien, 123 Ill. App. 437, affirmed, 228 Ill. 476, 81 N. E. 1076.

² Smith & Valle Co. v. Butts, 72 Miss. 269, 16 So. 242.

one court.³ Other courts hold that this will amount to a waiver.⁴ But it seems that before it will be considered as an absolute waiver it should be shown that such was the intention of the parties. The promise of a subsequent purchaser,⁵ or an agent, to pay the claim is not a collateral security.⁶ Under statutory provisions, some courts have held that if the payment is guaranteed by a cash deposit, the lien will be waived.⁷ But in the absence of statutory provisions and of any clearly expressed intention to that effect the better doctrine is that it is not a waiver.⁸ So we have the same diversity of opinion upon the question whether a mortgage on the same property to secure the payment of a lien will amount to a waiver of the lien. A considerable number of courts hold that it has this effect.⁹ But the pre-

³ *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32.

⁴ *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 138 Ill. 207, 27 N. E. 935; *Croskey v. Corey*, 48 Ill. 442; *Dutton v. New England Mut. Fire Ins. Co.*, 29 N. H. 153. Questioned. *Milliken v. Armstrong*, 17 Ind. 456.

⁵ *Mervin v. Sherman*, 9 Iowa 331.

⁶ *Husband or wife. Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177.

⁷ Must be express agreement. *Allis v. Meadow Spring Dist. Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300. See § 144.

⁸ *Shickle, Harrison & Howard Iron Co. v. Council Bluffs Waterworks Co.*, 33 Fed. 13.

⁹ *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318; *Barrows v. Baughman*, 9 Mich. 213; *Trullinger v. Kofoed*, 7 Ore. 228, 33 Am. St. 708; *Bristol-Goodson Electric Light, &c., Co. v. Bristol Gas, Elec-*

tric Light, &c., Co., 99 Tenn. 371, 42 S. W. 19. There is an irreconcilable conflict of authorities. *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 779. Second mortgage. *Weaver v. Demuth*, 40 N. J. L. 238.

What is identical property.—The taking of bonds secured by a mortgage on "all the franchises, fuel, rolling stock, cars, engines, machinery, and appurtenances appertaining or belonging to" a single division of a railroad line which embraces four different divisions, as collateral security for a mechanic's lien claimed upon "building, erection, or other improvement, including any work of internal improvement," on the entire line of road, including the four divisions, is not equivalent to taking security upon the identical property upon which the mechanic's lien is sought to be enforced. *Hale v. Burlington, C.*

vailing opinion seems to be that it does not amount to a waiver,¹⁰ unless it affirmatively appears that such was the intention of the parties.¹¹ If the collateral security is surrendered before the lien right is lost by expiration of time, all are agreed that the right will not be waived.¹²

§ 180. Waiver by estoppel.—The doctrine of waiver in its application generally rests upon the doctrine of estoppel, and has the same application in mechanic's liens as in other cases.¹ Generally if one is not obliged to speak his silence will not work an estoppel.² An attempted settlement,³ or advanced

R. & N. R. Co., 2 McCrary (U. S.) 558, 13 Fed. 203.

¹⁰ Arkansas—Roberts v. Wilcoxson, 36 Ark. 355.

Mississippi—Kingsland & Douglas Mfg. Co. v. Massey, 69 Miss. 296, 13 So. 269; Parberry v. Johnson, 51 Miss. 291.

New York—Brumme v. Herod, 38 App. Div. (N. Y.) 558, 56 N. Y. Supp. 670; Hall v. Pettigrove, 10 Hun (N. Y.) 609.

New Mexico—Mountain Electric Co. v. Miles, 9 N. Mex. 512, 56 Pac. 284.

Texas—Farmers' & Mechanics' Nat. Bank v. Taylor, 91 Tex. 78, 40 S. W. 876, 966. It is not collateral security. Gilcrest v. Gottschalk, 39 Iowa 311.

¹¹ Nebraska—Henry & Coatsworth Co. v. Fisherick, 37 Neb. 207, 55 N. W. 643.

Missouri—Gorman v. Sagner, 22 Mo. 137.

South Dakota—Charles Betcher Co. v. Cleveland, 13 S. Dak. 347, 83 N. W. 366.

Wisconsin—Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co., 111 Wis. 570, 87 N. W. 458.

Federal—Hale v. Burlington, &c., R. Co., 2 McCrary (U. S.) 558, 13 Fed. 203.

¹² National Lumber Co. v. Bowman, 77 Iowa 706, 42 N. W. 557; Getchell v. Musgrove, 54 Iowa 744, 7 N. W. 154. Taking judgment. A claim for lien is not waived by the taking of a judgment at law upon the account due and unpaid. Sorg v. Crandall, 129 Ill. App. 255, affirmed; Lowden v. Sorg, 233 Ill. 79, 84 N. E. 181.

¹ Estoppel and implied consent, see § 35. Estoppel of owner, see § 142. Estoppel of lienholder, see § 154. Estoppel of mortgagee, see § 161. See Dec. & Am. Dig. tit. Mechanic's Liens, § 216.

² Bruce Lumber Co. v. Hoos, 67 Mo. App. 264. The fact that a purchaser goes through a house, in the presence of the contractor, which is apparently done, but is not in fact, the contractor not informing purchaser of that fact, will not estop him from asserting his lien. Billings Co. v. Brand, 187 Mass. 417, 73 N. E. 637.

³ Palmer v. McGinness, 127 Iowa 118, 102 N. W. 802.

payment,⁴ or commencement of foreclosure proceedings,⁵ or receipt of part of the consideration in property,⁶ or in money, are not estoppels.⁷ But the acceptance of other security,^{7a} or agreement not to look to the owner,⁸ or not to have a lien,⁹ or advice to make a mortgage and giving assistance in selling bonds secured thereby,¹⁰ or execution of receipt in full, where parties act on such receipts, are estoppels.¹¹ There is no estoppel generally unless, without it, a wrong will result from the action of the party against whom the estoppel is sought.¹² The doctrine of estoppel is one of prevention of fraud, and other things being equal, it will at no time be applied to prevent the mechanic from taking a lien, unless the taking of it will work a fraud upon some third person.¹³ Where one releases his mortgage lien in order to enable the owner to raise money by a mortgage he is estopped from asserting his mortgage. But the fact that the lienor expects money raised on a mortgage to be applied on his lien will not work as an estoppel of the mortgage right.¹⁴

⁴ *Munroe v. Merrell*, 113 Mich. 491, 71 N. W. 850. See advance payment, § 51.

⁵ *Dowd v. Dowd*, 126 Mich. 649, 86 N. W. 128, 8 Det. Leg. N. 196.

⁶ *Bayard v. McGraw*, 1 Ill. App. 134.

⁷ *Cook v. Hunt*, 24 Ill. 536.

^{7a} *Keller v. Coman*, 162 Ill. 117, 44 N. E. 434; *Smith v. Iowa City Loan & Bldg. Assn.*, 60 Iowa 164, 14 N. W. 221; *Willison v. Douglass*, 66 Md. 99, 6 Atl. 530. See preceding sections.

⁸ *Green Bay Lumber Co. v. Thomas*, 106 Iowa 154, 76 N. W. 651.

⁹ *Aikens v. Frank*, 21 Mont. 192, 53 Pac. 538.

¹⁰ *Electric Light Co. v. Bristol*

Gas, &c., Co., 99 Tenn. 371, 42 S. W. 19.

¹¹ *Cote Brilliant Pressed Brick Co. v. Sadring*, 68 Mo. App. 15.

¹² *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546.

¹³ *District of Columbia—Phillips v. Gilbert*, 2 MacArthur, (D. C.) 415.

Illinois—Commercial Loan, &c., Assn. v. Trevette, 160 Ill. 390, 43 N. E. 769; *Hughes v. McCasland*, 122 Ill. App. 365.

Indiana—Acker v. Massman, 12 Ind. App. 696, 41 N. E. 77.

Utah—Spargo v. Nelson, 10 Utah 274, 37 Pac. 495.

¹⁴ *McGraw v. Bayard*, 96 Ill. 146; *Henry, &c., Co. v. Fisherdick*, 37 Neb. 207, 55 N. W. 643.

§ 181. **Waiver as affecting subcontractors.**—Before the statements or conduct of a subcontractor will estop him, it must be shown that such statement or conduct will work an injury to the person claiming the estoppel. The fact that the statement is false,¹ or fraudulent, is not sufficient.² If the subcontractor gives the owner a receipt and accepts a worthless check, and the owner pays the contractor on the faith of such receipt, the subcontractor will be estopped from asserting his lien as against the owner.³ But the fact that the subcontractor was present at a settlement made between the owner and contractor,⁴ and made no objection to the owner's paying the contractor in full, knowing that the latter was going to leave the state, will not estop the subcontractor from asserting his right.⁵ If the subcontractor should direct,⁶ or consent that the owner pay the contractor, as a matter of course he will be bound.⁷ He will not be bound by the representations of an agent, unless the agent has full authority.⁸ So if the subcontractor accepts money arising from a mortgage or assists in selling bonds, he will be bound and can not assert his lien as against the mortgage.⁹ As a matter

¹ *Simonsen v. Stachlewicz*, 82 Wis. 338, 52 N. W. 310.

² *Washburn v. Kahler*, 97 Cal. 58, 31 Pac. 741; *Abham v. Boyd*, 7 Daly (N. Y.) 30. In an action by D., a mechanic, to enforce a lien for labor on A.'s building, an answer that, before the recording of the notice of the lien, A. had paid M., the contractor, in full, that D. could then have collected his claim of M., and that afterwards D. had assisted M. to dispose of his property subject to execution, with intent to defraud A., well knowing of such payment, was insufficient; D.'s right to a lien being statutory. *Andis v. Davis*, 63 Ind. 17.

³ *Cook v. Herring*, 30 Pittsb. Leg. J. (N. S.) (Pa.) 70.

⁴ *Havighorst v. Lindberg*, 67 Ill. 463.

⁵ *Merritt v. Pearson*, 58 Ind. 385.

⁶ *Rand v. Grubbs*, 26 Mo. App. 591.

⁷ *Chilton v. Lindsay*, 38 Mo. App. 57. Certain installments only included. *Biggs v. Clapp*, 74 Ill. 335.

⁸ *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Morton Lumber Co. v. Driving Park Assn.*, 64 Mo. App. 377.

⁹ A mechanic furnishing material for the construction of a mill, under a contract with the owner,

of course, only such persons that may have an interest and be affected, can claim or assert the benefit of the waiver.¹⁰

§ 182. Waiver by taking bond or deposits.—If properly executed and such is the intention of the parties, there is no mechanic's lien but that can be waived or discharged by the giving of a proper bond or making a sufficient deposit.¹ It should be borne in mind that the bond spoken of here to prevent a lien is not an indemnity bond in the general use of that term, but is a bond to take the place of the lien itself and pay the debt. In some states the statutes provide a method of preventing a lien by the giving of a bond and subcontractors are relegated to that bond to recover whatever may be due them, and unless a bond is given under such a statutory provision, it will be a protection or operate as a waiver only upon the rights of the persons who are parties to the bond.² Where a bond is given under a statute to discharge the property from a mechanic's lien, the bond must

may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien, as against such creditors, although he has made no express promise that he will not assert such lien. *West v. Klotz*, 37 Ohio St. 420.

¹⁰ *Leftwich Lumber Co. v. Florence Mut. Building, &c., Assn.* 104 Ala. 584, 18 So. 48; *Lyon & Sons Lumber, &c., Co. v. Equitable Loan & Inv. Assn.*, 174 Ill. 31, 50 N. E. 1006.

¹ *Rockwell v. Kelly*, 190 Mass. 439, 77 N. E. 490. Must be filed properly if the law so requires. *Kille v. Bentley*, 6 Kan. App. 804, 51 Pac. 232. See *Dec. & Am. Dig. tit. Mechanics' Liens*, § 218.

² In Ohio, where the statute makes no provision for a bond, it was held (*American Surety Company v. Raeder*, 15 Ohio C. C. 47, affirmed by Supreme Court, 43 Bulletin 39) where a bond was given by a contractor, the stipulation of such bond being as follows: "The condition of this obligation is such, that, whereas the said Peter J. Black, did, on the 27th day of May, A. D. 1895, enter into the foregoing agreement with said Board of Education, which said agreement is made a part of this bond, the same as though fully set forth herein, now, if the said Peter J. Black, designated as said party of the second part, in the said foregoing agreement, shall well and truly per-

be made and executed in accordance with the provisions of such statute.³ Any person who has a sufficient interest in the property to make a contract binding it for a lien, will have sufficient interest to require a bond to protect it from liens.⁴ It is always good practice to follow the statute in the making of a statutory bond, yet if the bond is sufficient according to the rules of common law, it will be sufficient for the purpose of discharging the lien.⁵ However, if by statute the giving of such bond transfers the claimant's right to a lien to the

form all and singular, the stipulations of said agreement by him to be performed and shall pay all just and legal claims for labor performed upon, and for materials furnished for the work specified in said agreement, the same shall remain in full force and virtue in law; otherwise, then, this obligation shall be void. We hereby agreeing and consenting that this undertaking shall be for the use of any laborer or materialman having a just claim as aforesaid as well as for said Board of Education." That under such bond any of the persons therein mentioned to be protected to-wit, labor or material men, might sue on such bond. One of the principal cases relied upon and where there is no statute bearing upon the subject is that of *City of St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. 695. Cases cited as holding the same view are *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Baker v. Bryan*, 64 Iowa 561, 21 N. W. 83; *Knapp v. Swaney*, 56 Mich. 345; 23 N. W. 162, 56 Am. Rep.

397; *In re 478 Cherry St.*, 27 Misc. (N. Y.) 682, 58 N. Y. Supp. 665.

³ *Mathiasen v. Shannon*, 25 Misc. (N. Y.) 274, 54 N. Y. Supp. 305. In Illinois it is held that it could be made at any time, even after suit to enforce a lien was commenced. *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201. But in Pennsylvania it was held too late, after a scire facias was issued. *Hood v. Building Assn.*, 9 Phila. (Pa.) 105, 30 Leg. Int. (Pa.) 44; *Maulsbury v. Simpson*, 11 Phila. (Pa.) 196, 33 Leg. Int. (Pa.) 108. This matter is entirely controlled by statute. *Sulzer v. Ross*, 12 Pa. Super. Ct. 206.

⁴ *Massachusetts*. — *Breed v. Gardner*, 187 Mass. 300, 72 N. E. 983; *Landers v. Adams*, 165 Mass. 415, 43 N. E. 119; *Glendon Co. v. Townsend*, 120 Mass. 346.

New York.—*Miller & Schmitt*, 35 Misc. (N. Y.) 231, 71 N. Y. Supp. 771; *New York Lumber &c., Co. v. Seventy-third St. Bldg. Co.*, 15 Daly (N. Y.) 133, 3 N. Y. Supp. 937.

⁵ *Carnegie v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498, 36 U. S. App. 81.

bond, and the statute should be declared unconstitutional, the bond can not be upheld even if it were good as a common law obligation.⁶ These bonds are liberally construed so as to accomplish the purpose intended and will not be invalid by reason of immaterial defects; thus, where the statute directed the bond to be made to the contractor and it was made directly to the material man for whose benefit it was intended⁷ or where it does not directly say for whose benefit it is, but this fact can be gathered from other recitals,⁸ or where treated as valid by all the parties,⁹ or where the seal has been omitted, it will not be held invalid.¹⁰ If the law should be repealed after the bond is made, it will be valid as to all existing rights.¹¹ In order for a person to be a beneficiary under a bond, he must bring himself within its terms and the statute relating thereto.¹² It cannot include property not coming within its description.¹³ The rule that a person who has made a mis-representation can reap no benefit therefrom, applies in case of these bonds as well as elsewhere.¹⁴ If the owner fails to take a bond in sufficient amount, he may be liable for the balance.¹⁵

⁶ *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964; *Marshall v. Krauskop*, 18 Lanc. (Pa.) 388. Must be indexed under Pennsylvania act of 1895-1901. *King v. Reese*, 15 York, 86; 8 Del. Co. Ct. (Pa.) 304.

⁷ *Carnegie v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498, 36 U. S. App. 81.

⁸ *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964. If no penalty inserted, bond is good. *United States Wind-Engine & Pump Co. v. Drexel*, 53 Neb. 771, 74 N. W. 317.

⁹ *Sheffield v. Murray*, 80 Hun (N. Y.) 555, 30 N. Y. Supp. 799.

¹⁰ *Whitney v. Coleman*, 9 Daly (N. Y.) 238.

¹¹ *Hawkins v. Mapes-Reeves* Const. Co., 82 App. Div. (N. Y.) 72, 81 N. Y. Supp. 794.

¹² *Gibbs v. Tally*, 63 Pac. 168, reversed on another point in 133 Cal. 373, 65 Pac. 970; *Hood v. Building Assn.*, 9 Phila. (Pa.) 105, 30 Leg. Int. (Pa.) 44.

¹³ *Kille v. Bentley*, 6 Kan. App. 804, 51 Pac. 232.

¹⁴ *Bugger v. Cresswell*, (Pa.) 12 Atl. 829.

¹⁵ *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1581, 28 So. 182.

§ 183. **Waiver by deposit—Effect and operation of.**—There may be a waiver by a deposit of a sum of money sufficient to satisfy all liens as well as the giving of a bond.¹ Statutes permitting this to be done in order to defeat the mechanic's lien on the property, must be strictly followed,² and the amount must cover the same claim on which a judgment may be recovered.³ Of course the contractor or material man may waive his right to such deposits and the owner may likewise, and by agreement the parties may release their lien rights.⁴ If a deposit is made in court it will be valid until the matter is finally terminated.⁵ When the deposit has been made or the bond given in accordance with statutory provisions permitting the same to be given and liens discharged, then it will so act and the property is free, the parties being required to pursue the deposits or the bond for their claim.⁶ And it will be no defense to the bond that a party had not perfected his lien claim.⁷ But the bond must be a valid one,⁸ and the money must not be withheld by fault of the person in whose favor the bond is given.⁹ A lien holder

¹ See § 179.

² *Burton v. Rockwell*, 63 Hun (N. Y.) 163, 17 N. Y. Supp. 665; *Hall v. Dennerlein*, 14 N. Y. Supp. 796, 39 N. Y. St. 67. Money will be returned when lien is discharged. *In re Thirty-Fifth St. &c., Realty Co.*, 121 App. Div. (N. Y.) 625, 106 N. Y. Supp. 390.

³ *Dowdney v. McCollom*, 5 Daly (N. Y.) 240.

⁴ *Whittier v. Blakely*, 13 Ore. 546, 11 Pac. 305.

⁵ *Hafker v. Henry*, 5 App. Div. (N. Y.) 258, 39 N. Y. Supp. 134; *Cunningham v. Hatch*, 18 N. Y. Supp. 458, 45 N. Y. St. 685.

⁶ *Trustees of Wyly Academy v. Sanford*, 17 Fla. 162; *Dunning v.*

Clark, 2 E. D. Smith (N. Y.) 535; *Sulzer v. Ross*, 12 Pa. Super. Ct. 206. *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201; *Hoffman v. Haines*, 8 Phila. (Pa.) 248. On paying into court the amount owing by him to the principal contractor, the owner may have the principal contractor substituted as defendant and be discharged as provided for by Rev. St. Wis. § 2610. *Wagner v. McMillen*, 72 Wis. 327, 39 N. W. 777.

⁷ *Risse v. Hopkins Planing Mill Co.*, 55 Kan. 518, 40 Pac. 904.

⁸ *Keyes v. Brackett*, 187 Mass. 306, 72 N. E. 986.

⁹ *Baumhoff v. St. Louis, &c., R. Co.*, 171 Mo. 120, 71 S. W. 156.

may raise the question as to the bond's validity.¹⁰ But before the lienor is entitled to the benefits of the bond, he must show that he has such a claim against the property as the law declares is a proper one to bring him in as a beneficiary of the bond.¹¹

§ 184. Waiver—Liability on bond made to release lien.—

Most all of these bonds are of a statutory nature, no two of the statutes being exactly alike, and it would be very difficult to give any general rule to be applied to all. Taking into consideration the statutes under which they are given it may be said that the construction ordinarily given to liability on bonds will apply.¹ In the first place no one can claim protection of a bond who does not come within the express or implied obligation of such bond. If it is conditioned to protect the owner, it will not aid any one else,² unless the statute expressly makes it so.³ If there is no liability between the owner and the contractor, there is nothing to support the bond, and it is invalid.⁴ There may be circumstances which will allow some to take advantage of it to the exclusion of others.⁵ As a general thing the contractor is principal in these bonds, and if he is financially responsible suit will be brought directly by a claimant against him. Therefore, as a general

¹⁰ *Taunton Sav. Bank v. Burrell*, 179 Mass. 421, 60 N. E. 930; *Kerrigan v. Fielding*, 47 App. Div. (N. Y.) 246, 62 N. Y. Supp. 115.

¹¹ *In re Dean*, 83 Hun (N. Y.) 413, 31 N. Y. Supp. 959; *Raven v. Smith*, 76 Hun (N. Y.) 60, 27 N. Y. Supp. 611; *People v. Butler*, 61 How. Pr. (N. Y.) 274; *Dunning v. Clark*, 2 E. D. Smith, (N. Y.) 535.

¹ See § 182. Action on Indemnity Bond.

² *Lichtentag v. Feltel*, 113 La. 931, 37 So. 880; *Neith Lodge*, No.

21, v. *Vordenbaumen*, 111 La. 213, 35 So. 524.

³ *Green Bay Lumber Co. v. Independent School Dist.*, 121 Iowa 663, 97 N. W. 72; *Salmen Brick, &c., Co. v. Le Sassier*, 106 La. 389, 30 So. 7.

⁴ *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 Pac. 83; *Casey v. Connors Bros. Const. Co.*, 53 Misc. (N. Y.) 101, 103 N. Y. Supp. 1103.

⁵ *United States Wind Engine & Pump Co. v. Drexel*, 53 Neb. 771, 74 N. W. 317.

rule, it is only when he is not responsible that suit is brought on the bond and the surety sought to be held responsible, and like other bonds it is strictly construed in favor of such surety. But if the surety sign the bond and the property is thereby relieved from the lien claim and the contractors have no other security except the bond, the sureties will be bound by strict obligation of such bond.⁶ The fact that a material man may have so acted at the time his payments are extended or changed,⁷ or attempted to make payments by a void obligation,⁸ or that judgment in foreclosure did not provide for the enforcement of the lien against the property, will not release the surety.⁹ Some courts have held that if on the faith of the bonds, the liens are discharged, the surety can not question the validity of the bond.¹⁰ If the bond is treated as valid by all parties,¹¹ or the mechanic is induced not to file a lien,¹² or the surety knows that the material has been furnished, he is not permitted to deny these facts.¹³ The surety however is not liable for departures from the original contract as covered by the bond,¹⁴ or where the lien is discharged for some other cause,¹⁵ or where a new contract

⁶ *Neith Lodge, No. 21, v. Vordenbaumen*, 111 La. 213, 35 So. 524.

⁷ *Chaffee v. United States Fidelity, &c., Co.*, 128 Fed. 918, 63 C. C. A. 644.

⁸ *Chester City Presbyterian Church v. Conlin*, 7 Del. Co. Ct. 437, 11 Pa. Super. Ct. 413.

⁹ *Ringle v. O'Matthiessen*, 39 N. Y. Supp. 92, 17 App. Div. (N. Y.) 374, 45 N. Y. Supp. 226. A surety is not released where not prejudiced. *Neithe Lodge, No. 21, v. Vordenbaumen*, 111 La. 213, 35 So. 524.

¹⁰ *Mathiasen v. Shannon*, 25 Misc. (N. Y.) 274, 54 N. Y. Supp. 305.

¹¹ *Miller v. Youmans*, 13 Misc. (N. Y.) 59, 34 N. Y. Supp. 140.

¹² *Carnegie v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498, 36 U. S. App. 81.

¹³ *Brink v. Bartlett*, 105 La. 336, 29 So. 958.

¹⁴ *Tinsley v. Kemery*, 111 Mo. App. 87, 84 S. W. 993.

¹⁵ Where a suit to enforce a lien fails to establish the mechanics' liens sought to be enforced, but a constructive trust upon a fund in the hands of one of the defendants is declared in favor of the lienors, the obligation of the undertaking filed by a subsequent purchaser of the property ceases, and the principal and his sureties

is made,¹⁶ or the old contract materially changed.¹⁷

§ 185. **Waiver—Action on such bond.**—Under the New York statute an action on a bond given to an owner conditioned for the payment of any judgment that may be rendered against the property is maintainable against all parties interested, including the sureties without foreclosing the lien.¹ This same court holds that the action is equitable,² and the practice is simple.³ It is proper to make parties to such an action all persons who should be parties in the suit to foreclose the lien without there having been a bond given.⁴ The

are discharged. *Anglo-American Savings, &c., Assn. v. Campbell*, 13 App. Cas. (D. C.) 581.

¹⁶ *Manny v. National Surety Co.*, 103 Mo. App. 716, 78 S. W. 69.

¹⁷ *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201. Where a bond has been given by the contractor for the faithful performance of the contract, and where, without the knowledge of the sureties, the owner ordered, by parol, certain changes that materially increased the cost of such building, and such changes were executed by the contractor, held, that the parties thereby changed their contract, and to hold the sureties liable under this substituted arrangement would be to hold them beyond the express terms of their contract. *Chester City Presbyterian Church v. Conlin*, 7 Del. Co. Ct. 427, 11 Pa. Super. Ct. 413.

¹ *Morton v. Tucker*, 145 N. Y. 244, 40 N. E. 3. *Contra*. *Sheffield v. Robinson*, 73 Hun (N. Y.) 173,

25 N. Y. Supp. 1098; *Brandt v. Radley*, 23 N. Y. Supp. 277. See for premature action. *Dearing v. Boss*, 55 Misc. (N. Y.) 58, 106 N. Y. Supp. 219. See *Dec. & Am. Dig. tit. Mechanics' Liens*, § 228.

² *Ringle v. O'Matthiessen*, 39 N. Y. Supp. 92.

³ *Morton v. Tucker*, 145 N. Y. 244, 40 N. E. 3.

⁴ *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833; *Miller v. McKeon*, 15 App. Div. (N. Y.) 133, 44 N. Y. Supp. 371; *State v. Bowman*, 10 Ohio 445; *Sheffield v. Robinson*, 73 Hun (N. Y.) 173, 25 N. Y. Supp. 1098. Owner of property necessary party. *Von Den Driesch v. Rohrig*, 45 App. Div. (N. Y.) 526, 61 N. Y. Supp. 341. Purchaser of lot necessary. *Garland v. Van Rensselaer*, 71 Hun (N. Y.) 2, 24 N. Y. Supp. 781. All who have filed liens, etc. *Scherer v. Music Hall Co.*, 18 N. Y. Supp.

sureties may plead any defense that is open to the contractor.⁵ Whoever is entitled to the benefit of the bond, as a matter of

459. The allegations of the complaint as to the name of the obligee are as follows: "That thereafter, and on or about the 11th day of July, 1894, the defendant Poerschke obtained an order of the court of common pleas for the city and county of New York fixing the amount of the bond to be given to discharge this lien at four hundred (\$400) dollars; that thereafter the said defendant Poerschke did give his bond, with the defendants Henry A. Ficke and Herman Miller as sureties, in the amount fixed by the court, dated the 14th day of August, 1894, and conditioned for the payment of any judgment which may be rendered against said property in any proceeding to enforce this lien, and an order was entered approving said bond and discharging the lien, and said lien was thereupon discharged by the clerk of the city and county of New York." The allegations were held sufficient, since it will be assumed that the bond was properly made to the county clerk. *Reilly v. Poerschke*, 19 Misc. (N. Y.) 612, 44 N. Y. Supp. 422; *Pierce, &c., Mfg. Co. v. Wilson*, 118 App. Div. (N. Y.) 662, 103 N. Y. Supp. 678.

⁵ *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash. 268, 69 Pac. 784; *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. 723; *Sullivan v. Goodwin*, 164 N. Y. 583, 58 N. E. 1092; *Heagney v.*

Hopkins, 23 Misc. (N. Y.) 608, 52 N. Y. Supp. 207; *Meyers v. Wood*, 95 Tex. 67, 65 S. W. 174. No defense that account was not sworn to. *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369. Terms of bond controls over pleader's statement. *Goldstein v. Michelson*, 45 Misc. (N. Y.) 601, 91 N. Y. Supp. 33. No defense that the maker is liable to city only. *Smith v. New York*, 32 Misc. (N. Y.) 380, 66 N. Y. Supp. 686. No defense where bond given city, that the lien was not fully perfected. *Smith v. New York*, 32 Misc. (N. Y.) 380, 66 N. Y. Supp. 686. See *Ringle v. Wallis Iron Works*, 16 Misc. (N. Y.) 167, 38 N. Y. Supp. 875, 25 N. Y. Civ. Proc. 261, as to sufficiency of courts fixing amount of bond. Giving of a bond to discharge property from a mechanic's lien is not an acknowledgment of the validity of the lien. Recital in bond does not estop surety. *Parsons v. Moses*, 40 App. Div. (N. Y.) 58, 57 N. Y. Supp. 727. I Hill's Code, 2415, provides, inter alia, that contractors engaged on public works for a municipal corporation shall give a bond to secure payment for any material furnished in such works. Objection was raised to introduction of evidence under a complaint on a bond given under said section, because the bond's date was antecedent to that of the contract; and that it was therefore given to secure a different contract from that sued on. The

course may sue on it,⁶ and the action accrues whenever the obligation has been violated.⁷ Leave of court is not required,⁸ unless the bond has been given to a public officer for the benefit of the mechanic.⁹ Under the practice which makes it proper to procure permission to bring suit, it may be brought in the name of the real party in interest.¹⁰ As a matter of course no recovery can be had on the bond if no right to a lien exists as the bond merely takes the place of the lien.¹¹ And where litigation is brought on the lien and the surety is a party to such litigation, he cannot afterwards raise questions in a suit on the bond which should have been raised in the suit on the lien.¹² It has been held where the bond was joint and several, that suit might be brought against the surety before the remedies against the contractor were exhausted.¹³ The beneficiary under the bond may collect all that is rea-

objection was properly overruled as the date did not affect the validity of the bond. *Spokane, &c., Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

⁶ *Green Bay Lumber Co. v. Independent School Dist.*, 121 Iowa 663, 97 N. W. 72; *Ringle v. Wallis Iron Works*, 16 Misc. (N. Y.) 167, 38 N. Y. Supp. 875, 25 N. Y. Civ. Proc. 261; *Pierce, &c., Mfg. Co. v. Wilson*, 118 App. Div. (N. Y.) 662, 103 N. Y. Supp. 678. No demand or notice required before action brought. *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369.

⁷ *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369; *Green Bay Lumber Co. v. Independent School Dist.*, 121 Iowa 663, 97 N. W. 72. Nominal damages only can be recovered for breach of a contractor's bond to keep a building free from liens, unless the owner has

paid and discharged liens thereon. *Henry v. Hand*, 36 Ore. 492, 59 Pac. 330.

⁸ *Reilly v. Poerschke*, 14 Misc. (N. Y.) 466, 36 N. Y. Supp. 1111.

⁹ *Goldstein v. Michelson*, 45 Misc. (N. Y.) 601, 91 N. Y. Supp. 33. See *Reilly v. Poerschke*, 19 Misc. (N. Y.) 612, 44 N. Y. Supp. 422, where it is held that leave is not required.

¹⁰ *In re John P. Kane Co.*, 66 N. Y. Supp. 684.

¹¹ *Parsons v. Moses*, 40 App. Div. (N. Y.) 58, 57 N. Y. Supp. 727.

¹² *Manny v. National Surety Co.*, 103 Mo. App. 716, 78 S. W. 69.

¹³ *Manny v. National Surety Co.*, 103 Mo. App. 716, 78 S. W. 69. A joint judgment is not invalid. *Spokane, &c., Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

sonably covered by it including expenses.¹⁴ In some jurisdictions it is held that the action is of the same kind as the suit to foreclose the lien,¹⁵ and that it remains a suit in equity.¹⁶

§ 186. **Loss of lien by attending circumstances.**—A lien may become ineffective not only by waiver or act of the parties, but by some peculiar circumstances brought into existence either by act of the parties themselves or otherwise. Thus where the property is located in two states, it will not be presumed that it was the intention to have a lien.¹ So the lien would be lost if the mechanic rescinded the contract and disposed of the material.² But a lien is not lost or destroyed because proceedings in foreclosure are brought; in such case the lien is not divested when the property is sold—assuming that the lienholder is a party to the action.³ Whether or not the destruction of the structure, the furnishing of

¹⁴ *California*. — *Ah Thale v. Quan*, 3 Cal. 216.

Massachusetts. — *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.

Missouri. — *Manny v. National Surety Co.*, 103 Mo. App. 716, 78 S. W. 69.

New York. — *Dubois v. Hermance*, 56 N. Y. 673.

Oregon. — *Henry v. Hand*, 36 Ore. 492, 59 Pac. 330. Reasonable attorney's fees. *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash. 268, 69 Pac. 784. Recovery of interest. *Spokane, &c., Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

¹⁵ *Cunningham v. Doyle*, 5 Misc. (N. Y.) 219, 25 N. Y. Supp. 476; *Kruger v. Braender*, 3 Misc. (N. Y.) 275, 23 N. Y. Supp. 324.

¹⁶ *Schillinger Fire-Proof Co-*

ment & Asphalt Co. v. Arnott, 86 Hun (N. Y.) 182, 33 N. Y. Supp. 343.

¹ A contract for making improvements on property lying in two states, providing for the execution of notes in payment secured by collaterals, some of which notes did not mature within the time in which suits to enforce a mechanic's lien were required to be brought, is an implied waiver. *Harris v. Youngstown Bridge Co.*, 90 Fed. 322, 33 C. C. A. 69. See Dec. & Am. Dig. tit. Mechanics' Lien, § 230.

² *Barnett v. Stevens*, 16 Ind. App. 420, 43 N. E. 661, 45 N. E. 485.

³ *Leftwich Lumber Co. v. Florence Mut. Bldg., Loan & Sav. Assn.*, 104 Ala. 584, 18 So. 43. See

labor or materials for the erection of which gave rise to the lien, will extinguish it, is a question upon which the courts are not in accord. The divergence of opinion is caused frequently by the divergence of the statutes creating the lien, but this is not always so. It may be stated as a general rule that where the lien is on the land—and incidentally the building—in the absence of contract to the contrary, the destruction of the building will not destroy the lien.⁴ Some states, however, hold and with considerable force of reason that when the building is destroyed the lien can not be held on the land.⁵ And the reason for this is that the land having received no benefit, it is unjust and inequitable to hold it responsible.⁶ The doctrine that the land is responsible is held to extend to subcontractors as well as contractors.⁷ It seems that the land is made liable generally for the mechanic's lien on the theory that it receives a benefit and it would be inequitable to destroy or deny the right of the mechanic to compel the land to answer to the lien: Conversely, if the land receives no bene-

also *Berger v. Long*, 1 Walk, (Pa.) 143, 31 Leg. Int. (Pa.) 373.

⁴ *Illinois*.—*Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Sontag v. Brennan*, 75 Ill. 279.

Indiana.—*Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; *Bratton v. Ralph*, 14 Ind. App. 153, 42 N. E. 644.

Iowa.—*Clark v. Parker*, 58 Iowa 509, 12 N. W. 553.

Louisiana.—*Sargeant v. Daunoy*, 14 La. 43, 33 Am. Dec. 573.

Minnesota.—*Freeman v. Carson*, 27 Minn. 516, 8 N. W. 764.

New Mexico.—*Armijo v. Mountain Electric Co.*, 11 N. Mex. 235, 67 Pac. 726.

Texas.—*Stuart v. Broome*, 59 Tex. 466.

Federal.—*Hooven v. Featherstone*, 111 Fed. 81, 49 C. C. A. 229. Generally although all the materials, furnished, upon which the lien accrues, are destroyed or removed, the lien still continues against the land. *Steigleman v. McBride*, 17 Ill. 300.

⁵ *Wood v. Wilmington Conference Academy*, 1 Marv. (Del.) 416, 41 Atl. 89; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa 287; *Schukraft v. Ruck*, 6 Daly (N. Y.) 1; *Goodman v. Baerlocher*, 88 Wis. 287, 60 N. W. 415, 43 Am. St. 893n.

⁶ *Shine v. Heimbürger*, 60 Mo. App. 174.

⁷ *Goodman v. Baerlocher*, 88 Wis. 287, 60 N. W. 415, 43 Am. St. 893.

fit then it ought not to be charged. In some states it is held that the lien only attaches to the land as an incident to the building and therefore if the building is destroyed the lien is gone.⁸ In such cases the doctrine is limited to instances where the entire improvement is destroyed. If a part remains as where one house of a manufacturing plant is destroyed, the lien will attach on the remainder. It is somewhat difficult to conceive of a good reason for this distinction. The part destroyed confers no benefit on the remainder, and why should it be held responsible?⁹ Where the lien is on the building alone, then as a matter of course when it is destroyed the lien is lost.¹⁰ The courts generally divide in their conclusions in about the same manner in cases where a building is removed.¹¹ There seems to be no good reason why the land should be subjected to a lien if the building is removed by any other act than that of the owner. If materials are removed or severed when they are in the nature of the fixtures, the lien may be lost on such fixtures, but will attach and remain on the land.¹²

⁸ *Wigton's Appeal*, 28 Pa. St. 161; *Baird v. Otto*, 12 Pa. Co. Ct. 510, 2 Pa. Dist. 484; *Gross v. Camp*, 4 Pa. Co. Ct. 461. The equity of a mechanic's lien does not extend to the ground upon which the building is erected, or which is adjacent to it, except when it becomes necessary to the enjoyment of the building. *Presbyterian Church v. Stettler*, 26 Pa. St. 246.

⁹ *Armijo v. Mountain Electric Co.*, 11 New Mex. 235, 67 Pac. 726; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 27 Atl. 805, 33 W. N. C. (Pa.) 244; *Montgomery v. Keystone Fibre Co.*, 1 Pa. Super. Ct. 261.

¹⁰ *McLaughlin v. Green*, 48 Miss. 175.

¹¹ *Bishop v. Honey*, 34 Tex. 245. Not lost. *Gaty v. Casey*, 15 Ill. 189. A mechanic's lien filed for the price of an engine placed in a frame building at the foot of a mine to pump water therefrom, ceases to be a lien against the land when the building and engine are removed entirely away from the premises covered by the lien, and is not entitled to be paid out of the proceeds of an assignee's sale of the land. In re *Willauer's Estate*, 1 Chest. Co. Ct. (Pa.) 533.

¹² A lien upon a leasehold estate for improvements placed

§ 187. **Loss by transfer of title.**—When the lien right has once attached,¹ whether by giving notice,² or making contract,³ or registration,⁴ or delivery of material,⁵ or commencement of work,⁶ no transfer thereafter can affect the lien or cause it to lose its lien character.⁷ If the right to a lien has not attached, then the purchaser, without notice, takes the property free from the lien.⁸ However, the conveyance must be bona fide.⁹ If fraudulent, the lien will not be lost, even if notice is given after the conveyance.¹⁰ Where the owner is making repairs and sells the premises, and notifies the mechanics to discontinue their work, and pays them for what they have done, then it is held that he cannot be held personally for work thereafter done

thereon, is not lost by reason of the removal by a third person of the materials of which such improvements were composed, although the value of such lien may be affected by such removal. *Chicago Smokeless Gas Fuel Co. v. Lyman*, 62 Ill. App. 538.

¹ *Salem v. Lane*, 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481; *Blauvelt v. Woodworth*, 31 N. Y. 285. See Dec. & Am. Dig. tit. Mechanics' Liens, § 233.

² *Hankinson v. Riker*, 10 Misc. (N. Y.) 185, 30 N. Y. Supp. 1040. See § 149.

³ See § 149.

⁴ *Loring v. Flora*, 24 Ark. 151.

⁵ See § 149.

⁶ *Allen v. Sales*, 56 Mo. 28; *Brown v. Zeiss*, 59 How. Pr. (N. Y.) 345; *Meehan v. Williams*, 2 Daly (N. Y.) 367.

⁷ *Hotaling v. Cronise*, 2 Cal. 60; *Weller v. McNabb*, 4 Sneed (Tenn.) 422.

⁸ *Loring v. Flora*, 24 Ark. 151; *Rose v. Gray*, 40 Ga. 156. Not registered. *Weston v. Dunlap*, 50

Iowa 183. No notice given. *Quimby v. Sloan*, 2 E. D. Smith (N. Y.) 594, 2 Abb. Pr. (N. Y.) 93.

⁹ *New York Lumber & Woodworking Co. v. Seventy-third St. Bldg. Co.*, 5 App. Div. (N. Y.) 87, 38 N. Y. Supp. 869.

¹⁰ **Not fraudulent.**—The owner of lots upon which was a building loan mortgage, deeded them to another under an agreement whereby the latter promised to erect buildings thereon, and to give a mortgage to secure payment of the consideration, and the grantor promised to advance the balance due on the building loan mortgage. The grantor was on the property after the deed was made, and after the grantee had contracted with plaintiff to do part of the work in erecting the buildings, the grantor took a deed back from the grantee through a third person on default in the payment of the mortgage given to him by the grantee, and in consideration of the release by the

on the premises.¹¹ A technical forfeiture,¹² or surrender of a leasehold interest will not cause a loss of the lien.¹³ Neither will a surrender to the vendor by a purchaser in possession under an executory agreement,¹⁴ or to the wife of the purchaser divest a lien therein.¹⁵ The death of the owner after the lien has accrued will not extinguish the lien.¹⁶ However, a distinction is made where the lien has not become a consummated one or the right has not accrued in the lifetime of the deceased; then the lien right is lost.¹⁷ And in such cases the mechanic, if he has suffered any damage, would be compelled to look to the estate of the deceased for the same. The statutes generally take notice of such contingencies as the death of the owner and provide against loss by the occurrence of death.¹⁸ So, if the lien right has not attached before the property goes into the hands of a receiver, it will have no priority.¹⁹ But if the right has attached, the lien may be perfected and will be enforced against the property through the receiver.²⁰

§ 188. **Loss by sale, delay, merger.**—As a general rule, where the statute makes no provision as to the time within which a lien must be enforced, mere delay will not cause the loss of the lien right. But if the delay is unreasonable a court

grantor of a note given as liquidated damages. Held, that the transaction was valid, and did not show fraud as to mechanics and material men. *Altieri v. Lyon*, 59 N. Y. Super. Ct. 110, 13 N. Y. Supp. 617; *Meehan v. Williams*, 36 How. Pr. (N. Y.) 73, 2 Daly (N. Y.) 367. Deed as a mortgage. *McAuley v. Mildrum*, 1 Daly (N. Y.) 396.

¹¹ *Dustin v. Schroeder*, 100 Ill. App. 118.

¹² *Gaskill v. Trainer*, 3 Cal. 334.

¹³ *Gaskill v. Trainer*, 3 Cal. 334;

Dobschuetz v. Hollday, 82 Ill. 371.

¹⁴ *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Hoffstrom v. Stanley*, 14 Manitoba 227.

¹⁵ *Wingert v. Stone*, 142 Pa. St. 258, 21 Atl. 812.

¹⁶ *Pifer v. Ward*, 8 Blackf. (Ind.) 252.

¹⁷ *Crystal v. Flannelly*, 2 E. D. Smith (N. Y.) 583.

¹⁸ See § 25.

¹⁹ *Smith v. Pierce*, 45 App. Div. (N. Y.) 628, 60 N. Y. Supp. 1011.

²⁰ *Arkansas*. — *Richardson v. Hickman*, 32 Ark. 406.

of equity may consider it such laches upon the part of the claimant as will work a loss of the right.¹ So in the prosecution of a pending suit an unreasonable delay may cause a loss of the lien.² The statutes often provide that a failure to enforce the lien within a reasonable time will cause its loss.³ The mere fact that the lien holder does not assert his claim where it exists on several properties, when one is sold on judicial process, has been held not to cause a loss of his right to assert his lien against the remainder.⁴ However, the rule may be different in cases where he is made a party and is asked to assert his claim. As a matter of course where the time limit is fixed by statute, and foreclosure is not had within that time, the right is lost.⁵ As a general rule it may be said that property sold at a judicial sale is sold free from all liens but this will only apply to the liens of parties that

Illinois.—*Barstow v. McLachlan*, 99 Ill. 641.

New York.—*Deady v. Fink*, 5 N. Y. Supp. 3, 24 N. Y. St. 734.

Texas.—*Fagan v. Boyle Ice Machine Co.*, 65 Tex. 324. See § 150.

¹ Fourteen years unreasonable time. *Stagner v. Woodward*, (Ky.) 1 S. W. 583.

² A judgment entry foreclosing a lien on land provided that it should not be enforced unless so directed by plaintiff, and the case should remain on the docket for further orders. No sale having been directed, an order was made four years later that the case be filed away, "subject to being re-docketed." After four years more the land was sold by plaintiff's direction. Held, no such laches as would destroy his lien as against the debtor. *Pittman v. Wakefield*, 90 Ky. 171, 13 S. W. 525. Party must show reasonable

diligence. *Erhman v. Kendrick*, 1 Metc. (Ky.) 146.

³ Expire by limitation after two years from the date of such filing. *Burbank v. Wright*, 44 Minn. 544, 47 N. W. 162, 47 N. Y. 162.

⁴ Appeal of Bank of Pittsburgh, 29 Pa. St. 330.

⁵ *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070, 28 So. 217; *Dole v. Bangor Auditorium Assn.*, 94 Me. 532, 48 Atl. 115; *Terwilliger v. Wheeler*, 81 App. Div. (N. Y.) 460, 81 N. Y. Supp. 173; *Baldwin v. Jeffries*, 2 Del. Co. Ct. (Pa.) 221. Under § 2481, Code Va. 1887, a suit to enforce a mechanic's lien must be brought within six months after the whole claim has become payable, and a bill will be demurrable which does not allege that this period has not elapsed. *Savings Bank of Richmond v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294; *Wilson*

were properly in the case and were before the court in such a way that it was their duty to set up their claims. When they are in court the lien is divested and transferred to the fund.⁶ The courts in construing some of the statutes have held that a subsequent mechanic's lien will not be divested or lost by a judicial sale to satisfy a preceding lien.⁷ It is thought, however, that this would depend upon the fact whether or not the holder of a subsequent mortgage was properly in court. It is the policy of the law, when property is offered at judicial sale in order that it may bring the best price possible, to divest it of all possible liens and relegate the lienholder to the funds derived from the sale. As a general rule where the owner of a lesser estate becomes the owner of the larger, the lesser estate becomes merged and this rule is applied to mechanics' liens.⁸ The mechanic's lien will not be lost in such case particularly, but will attach itself to a greater estate.⁹ But it cannot affect detrimentally the interest of the party holding the larger estate.¹⁰

v. Rudd, 70 Wis. 98, 35 N. W. 321. See §§ 190, 191.

⁶ Sharpe v. Tatnall, 5 Del. Ch. 302. The foreclosure of a mechanic's lien, prior in time but limited to the building, will not divest a subsequent mechanic's lien upon the land, the two liens attaching on different properties. Clark v. Parker, 58 Iowa 509, 12 N. W. 553. Under the Louisiana Law, if the holder of a judgment permitted the property to be sold on another execution he has lost his lien. Hoy v. Peterman, 28 La. Ann. 289. Where it is held that if it is sold on one lien of a number, the lien of all are divested. Anschutz v. McClelland, 5 Watts (Pa.) 487; see also Hallahan v. Herbert, 11 Abb. Pr. (N. S.) (N. Y.) 326, 4 Daly (N. Y.) 209;

Matlack v. Deal, 1 Miles (Pa.) 254.

⁷ Meeks v. Sims, 84 Ill. 422; Crandall v. Cooper, 62 Mo. 478; Ritchey v. Risley, 3 Ore. 184; Lieb v. Bean, 1 Ashm. (Pa.) 207.

⁸ Blatchford v. Blanchard, 160 Ill. 115, 43 N. E. 794; Jones v. Crump, 53 Hun (N. Y.) 631, 6 N. Y. Supp. 338; Simpson v. Master-son, (Tex. Civ. App.) 31 S. W. 419.

⁹ The right to a mechanic's lien against a leasehold estate is not lost by the purchase of such estate by the lessor, with knowledge when the subsequent filing of the lien claim is within the statutory time. Ellis v. Brisacher, 8 Utah 108, 29 Pac. 879.

¹⁰ Bowling v. Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. 371.

§ 189. **Loss or extinguishment of lien by release.**—A lien right may be extinguished by release or payment. But a release to be valid must be founded on a consideration.¹ In the absence of statute it need not be in writing,² and under the formalities of a deed or mortgage,³ nor need a full consideration be paid if the transaction is bona fide.⁴ However, a release will not be extended beyond the plain import of the words in which it is made.⁵ The release will not be binding or lien lost if given on conditions and the conditions are not complied with.⁶ Neither will the lien be lost or the right extinguished by the appointment of a receiver for either of the parties.⁷ If the statute requires certain formalities in the execution of the release, these must be followed in order to constitute a lawful release.⁸ A court of equity, however, may declare a release, where the equities are such that the lien incumbrances should be removed from the property even though these formalities have not been complied with. If the lien is on several houses a release of one house is held not to be a release of all, unless that is the manifest intention

¹ *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65. Modification of agreement. *Mason v. Gass*, 62 Mo. App. 449; *Benson v. Mole*, 9 Phila. (Pa.) 66. See Dec. & Am. Dig. tit. Mechanics' Liens, § 234.

² *Burns v. Carlson*, 53 Minn. 70, 54 N. W. 1055.

³ *Whitcomb v. Eustace*, 6 Ill. App. 574; *Burns v. Carlson*, 53 Minn. 70, 54 N. W. 1055.

⁴ *Burns v. Carlson*, 53 Minn. 70, 54 N. W. 1055. Should be delivered. *Wetherill v. Harbert*, 2 Pa. St. 348.

⁵ *Shropshire v. Duncan*, 25 Neb. 485, 41 N. W. 403. Express stipulation not to waive lien. *Hoyt v.*

Miner, 7 Hill. (N. Y.) 525. That the contract must receive a reasonable construction, and in the absence of language indicating a purpose under no circumstances to claim a lien, the Court cannot suppose the plaintiff intended to absolutely relinquish the security which the law gave him for his work and material. *McLaughlin v. Reinhart*, 54 Md. 71.

⁶ *Albrecht v. Foster Lumber Co.* 126 Ind. 318, 26 N. E. 157; *Katzenbach v. Holt*, 43 N. J. Eq. 536, 12 Atl. 383.

⁷ *Barstow v. McLachlan*, 99 Ill. 641.

⁸ *Sulzer v. Ross*, 8 Pa. Dist. 573.

of the parties.⁹ Whether or not the release is effectual is a question of law and fact to be determined in the same way as any other question of like character.¹⁰ If properly given a release or satisfaction destroys the right to a lien, and if the intention to release is clear, the court will not hear extrinsic evidence as to whom and how it might affect various parties.¹¹ The release will be given the construction which the language indicates.¹² Under some statutes there is a penalty attached where the lienor refuses to cancel a void lien.¹³

§ 190. Loss or extinguishment of lien—Discharge in bankruptcy.—A discharge, in bankruptcy, under the act of

⁹ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹⁰ *Paulsen v. Manske*, 24 Ill. App. 95. Subcontractor waived right. *Dowd v. Crow* 205 Pa. St. 214, 54 Atl. 780. Condition complied with. *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243, 29 W. N. C. (Pa.) 274. Where, under an agreement, an architect is to give orders to contractors to the owner of the building on the execution of releases, and they give releases and obtain the orders, such releases take effect on their production to the architect to obtain the order from him under the contract; hence those executing the releases cannot claim mechanic's liens on the ground that the releases were not to take effect until they received the money. *Golrick v. Tella*, 22 R. I. 281, 47 Atl. 598.

¹¹ *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532n.

¹² *A release*.—*Providence, R. I.* Feb. 10, 1893. To whom it may concern—For value received, we hereby release all our right of lien, title and interest in and to the estate situated at No. 198, Pine Street, in the city of Providence, in the state of Rhode Island, for material furnished and labor performed on said house for E. J. Damon & Company, Contractors. Held to release only material furnished before that time. *Jepherson v. Tucker*, 18 R. I. 429, 28 Atl. 610; *Brown v. Williams*, 120 Pa. St. 24, 13 Atl. 519, 6 Am. St. 689.

¹³ The complaint in an action for the penalty given by Gen. St. 1878, c. 90, § 15, for refusing to discharge of record a mechanic's lien which had been adjudged void, failed to allege that there ever was such a lien, as it did not set forth the contents or character of the account or of the affidavit

1867,¹⁴ or under the act of 1898, will extinguish the lien on bankrupt property,¹⁵ and such lien will be worked out through the proceedings.¹⁶

§ 191. **Loss by payment of debt.**—While there may be two remedies there is but *one debt*, and when the debt is paid or in some way satisfied, the lien is lost or extinguished and it makes no difference whether the payment be in money or by the way of counterclaim or set-off of mutual accounts.¹ Where the debt has not been paid in full or has been paid by taking of notes and other security, it will not be deemed paid so as to release the lien unless it is shown that such was the intention of the lienor when he received the same.² There may be an exception to this rule in cases where it would work a fraud on third persons.³ A partial payment will re-

verifying it, or of the claim of lien filed for record, but showed only that some sort of verified account and claim of lien were filed. Held, that this was insufficient to show a cause of action. *Houlihan v. Keller*, 34 Minn. 407, 26 N. W. 227.

¹⁴ *Seibol v. Simeon*, 62 Mo. 255; *Douglas v. St. Louis Zinc Co.*, 56 Mo. 388.

¹⁵ *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737; *In re Emslie*, 102 Fed. 291, 42 C. C. A. 350; *In re Kerby-Dennis*, 95 Fed. 116, 36 C. C. A. 677.

¹⁶ *In re Emslie*, 102 Fed. 291, 42 C. C. A. 350. *In Seibol v. Simeon*, 62 Mo. 255, under the act of 1867, it was held that if the proceedings had already begun in the State Court, that court might conclude the matters, but the rule

under the act of 1898, would be different.

¹ See §§ 68-70. *Graham v. Holt*, 4 B. Mon. (Ky.) 61.

² *Hulburt v. Just*, 126 Mich. 337, 85 N. W. 872, 8 Det. Leg. N. 46; *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522; *In re McFarland's Estate*, 16 Pa. Super. Ct. 142. See taking security, § 178. See Cash deposit, § 179.

³ Defendant, the holder of a mechanic's lien, and other lienholders agreed that the owner should pay \$500 of a certain amount due on a mortgage loan of the owner to defendant, and the balance to the other lienholders, and that on receiving such payments they would relinquish their liens. By accepting the

duce the claim pro tanto.⁴ If the debt is once paid, the lien then ends, the rights of third parties do not intervene, and it cannot be revived or brought to life by change of credits or other acts between the parties. Of course, if the rights of third persons do not intervene this rule might not be so strictly enforced between the original parties.⁵ Payment to the principal contractor unless made before the subcontractor's rights attach,⁶ or the statement is given as required by law,⁷ will not amount to a payment of the debt so far as the rights of the subcontractor are concerned.⁸ It is not necessary that the payment be made in money in order to constitute a valid release of the lien. It may be made in a note,⁹ or in any way that shows an intention of the parties to satisfy the lien.¹⁰

§ 192. **Loss by payment of debt—Subrogation.**—A person who voluntarily steps in and pays the debts of a third person is not subrogated to the rights of said third person to a lien that the third person might have if he had made the payments.¹¹

§500 defendant's status as a lien- or ceased, and hence he was not entitled to share in a surplus arising on the subsequent foreclosure of the mortgage. *Taylor v. Dutcher*, 60 App. Div. (N. Y.) 531, 69 N. Y. Supp. 951. ⁷ 74 N. W. 186; *Donnelly v. Johnes*, 58 N. J. Eq. 442, 44 Atl. 180; *Red River Lumber Co. v. Children of Israel*, 7 N. Dak. 46, 73 N. W. 203. ⁹ See § 179. *Benneson v. Thayer*, 23 Ill. 317 [374.]

⁴ *Duncan v. Aaron*, 6 Houst. (Del.) 566.

⁵ *Bopp v. Wittich*, 88 Mo. App. 129; *Spaulding v. Burke*, 33 Wash. 679, 74 Pac. 829.

⁶ *Tommasi v. Archibald*, 114 App. Div. (N. Y.) 838, 100 N. Y. Supp. 367. See §§ 144-146.

⁷ *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

⁸ *Blitz v. Fields*, 115 Mich. 675.

¹⁰ *Blakely v. Moshier*, 94 Mich. 299, 54 N. W. 54; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468n; *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695; *Harvey v. Brewer*, 178 N. Y. 5, 70 N. E. 73. Fraudulent if purposely made in advance. *Behrer v. City Suburban Homes Co.*, 114 App. Div. (N. Y.) 450, 100 N. Y. Supp. 35.

¹¹ *Mead's Appeal*, 46 Conn. 417.

§ 193. **Failure to satisfy lien—Ohio Statute.**—Sec. 3190 of the Ohio statute provides the manner in which a lienholder may forfeit his lien, and become liable for damages, as follows: If any lienholder, after the amount of his lien or judgment thereon, with legal costs, has been paid or tendered him, nevertheless proceeds to sell, lease, or rent such property as above provided, he shall forfeit his lien and pay the owner all damages arising to him therefrom, not exceeding the amount of the lien and his costs; and if the lienholder, after the amount of his lien has been satisfied, or adjudged against him in an action thereon, neglect or refuse on the written request of the owner within ten days thereafter, to file a certificate of such satisfaction or adjudication with the county recorder, which shall be entered by him on the margin of the record of the lien, such lienholder shall be liable to the owner for all damages arising therefrom, not exceeding the amount of the lien and costs.¹²

§ 194. **Application of payments made on debt.**—If the payor does not designate how the payments shall be applied, the payee may apply it to any debt owing him by the payor.¹ If neither the payor nor payee make an application, the court will apply it to the debt that has the least security,² or to the

¹² 74 Ohio Laws v. 168, § 7; (S. & C. 836).

¹ **Indiana.** — *Brigham v. De Wald*, 7 Ind. App. 115, 34 N. E. 498.

Michigan.—*Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545, 8 Det. Leg. N. 278.

Missouri.—*Wells Ridge v. Mercantile Loan, &c., Co.*, 56 Mo. App. 155.

Montana.—*Christnot v. Mon-*

tana Gold & Silver Min. Co., 1 Mont. 44.

Wisconsin.—*Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36.

United States. — *Caldwell v. Winder*, 2 Hayw. & H. 24, 30 Fed. Cas. 18,245. See Dec. & Am. Dig. tit. Mechanics' Liens, § 239.

² *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372; *Caldwell v. Winder*, 2 Hayw. & H. 24, 30 Fed. Cas. 18,245. To tracts sold first, *Dungan v. Dollman*, 64 Ind. 327.

earliest item,³ or to non-lienable items.⁴ Where there is a joint lien against several houses and the lien is released on one, the payment made to secure such release, should be first applied on the house released and then pro rata on the balance.⁵ If payments are made to a subcontractor for work on two houses, with no direction on which it is to be applied, he may apply it on either.⁶ And if he does not apply it, the court will pro rate it. If payment is made on a certain contract, it must be applied on that particular contract even if payments are made before required.⁷ Unless sufficient is paid to lift the entire debt on a number of houses and payments have been indiscriminately made, the lien will still exist.⁸ The same is true where the debt is for lienable and non-lienable items.⁹ The taking of a note unless so intended will not be considered as applied on the lien debt.¹⁰ Where the statute directs the distribution of payments, this of course controls.¹¹ When a credit is made to a certain account, it cannot be changed to affect the lien,¹² unless the credit was in fact a mistake,¹³ or the change has been made by consent

³ *Dey v. Anderson*, 39 N. J. L. 199; *Reynolds v. Patten*, 5 Misc. (N. Y.) 215, 25 N. Y. Supp. 100.

⁴ *North v. La Flessch*, 73 Wis. 520, 41 N. W. 633.

⁵ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

⁶ See § 195. *Smith v. Wilcox*, 44 Ore. 323, 74 Pac. 708, 75 Pac. 710.

⁷ *Post v. Campbell*, 83 N. Y. 279. Where a person, who is erecting a building and has purchased lumber of a merchant, becomes possessed of a note of the merchant payable in lumber of a greater amount than that already purchased, and afterwards purchases more than the balance of the note, and a lien is fixed by the

merchant, the claim is pro tanto extinguished by the note. *Hopkins v. Conrad*, 2 Rawle (Pa.) 316.

⁸ *Gantner v. Kemper*, 58 Mo. 567.

⁹ *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695.

¹⁰ *Bayard v. McGraw*, 1 Ill. App. 134; *Turner v. St. John*, 8 N. Dak. 245, 78 N. W. 340. See § 176.

¹¹ *Schallert-Ganahl Lumber Co. v. Neal*, 91 Cal. 362, 27 Pac. 743; *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

¹² *Petersen v. Shain*, (Cal.) 33 Pac. 1086; *Hopkins v. Conrad*, 2 Rawle (Pa.) 316.

¹³ *Green Bay Lumber Co. v.*

of the parties, and the rights of third persons are not affected.¹⁴ If part payment is made it is error to enter finding for the full amount.¹⁵

§ 195. **Payment to subcontractor affecting lien rights.**—If the owner pays valid claims of a subcontractor under circumstances that will justify him in so doing, this extinguishes the lien that might otherwise be had on the premises by either the contractor or subcontractor under him. For instance, if the subcontractor should secure a judgment against the contractor, and the owner pays it in order to save his property he will be entitled to take the sum so paid, and the attaching costs from the claim of the contractor,¹ and will be entitled to take the same from the claims of others who were subsequent and not in the same class of priority as the subcontractor that was paid.² The same rule will be applied where the subcontractor files his claim with the owner, who, after notice to the contractor as provided by statute, paid the claim without objection from the contractor.³ The owner cannot assume the right to pay claims of subcontractors and deduct the same from the claim of the contractor without his consent or a statutory permission so to do,⁴ and can only claim such right when he is under legal obligation to make the payment.⁵ If the claim of the sub-

Thomas, 106 Iowa 154, 76 N. W. 651.

¹⁴ Green Bay Lumber Co. v. Thomas, 106 Iowa 420, 76 N. W. 749.

¹⁵ Clark v. Huey, 12 Ind. App. 224, 40 N. E. 152.

¹ Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; Whittier v. Wilbur, 48 Cal. 175. Including attorney's fees, where allowed. Covell v. Washburn, 91 Cal. 560, 27 Pac. 859. Neither owner nor contractor can be held for more than their respective contract calls for.

Vandenberg v. Walton Lumber Co., — Okla. —, 92 Pac. 149. See Dec. & Am. Dig. tit. Mechanics' Liens, § 240.

² Dunlop v. Kennedy, (Cal.) 34 Pac. 92.

³ Nutriment Co. v. George Green Lumber Co., 94 Ill. App. 342; Baxter v. Sisters of Charity, 15 La. Ann. 686.

⁴ Walker v. Newton, 53 Wis. 336, 10 N. W. 436.

⁵ California—Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Southern California Lumber Co.

contractor is a valid one, the owner may pay it, and claim it as a credit against any claim that the principal contractor may have.⁶ Whatever payment the owner may make to a contractor before the subcontractor's right becomes fixed and attaches to whatever may be due or become due to the contractor as provided by statute, such a payment to the principal contractor is a valid one and cannot be questioned by the subcontractor.⁸ The same rule will be applied to a demand made by a principal contractor to a subcontractor, in regard to the rights of their subcontractors.⁹ But if the owner makes payments, when by the statute it is his duty to withhold the same in order to meet the claims of either contractor, subcontractor or material man, he does so at his peril.¹⁰

v. Jones, 133 Cal. 242, 65 Pac. 378.

Missouri.—Schroeder v. Mueller, 33 Mo. App. 28.

New Jersey.—Foster v. Rudderow, (N. J. Eq.) 3 Atl. 694.

New York.—Kenyon v. Walsh, 31 Misc. (N. Y.) 634, 66 N. Y. Supp. 35.

⁶ Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269.

⁸ **California.**—Southern California Lumber Co. v. Jones, 133 Cal. 242, 65 Pac. 378; Newport Wharf &c., Co. v. Drew, 125 Cal. 585, 58 Pac. 187.

Louisiana.—Vordenbaumen v. Bartlett, 105 La. 752, 30 So. 219; Willey v. St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182.

Maine.—Bryant v. Grady, 98 Me. 389, 57 Atl. 92.

Michigan.—Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

New York.—Garden City Co. v. Schnugg, 39 Misc. (N. Y.) 840, 81

N. Y. Supp. 496; Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73, also 82 App. Div. (N. Y.) 589, 81 N. Y. Supp. 846.

Rhode Island.—Cusson v. Gemme, 19 R. I. 507, 34 Atl. 1115.

Texas.—Baumgarten v. Mauer, (Tex. Civ. App.), 60 S. W. 451.

Virginia.—Schrieber v. Citizens Bank, 99 Va. 257, 38 S. E. 134.

⁹ Lawrence v. Dawson, 167 N. Y. 609, 60 N. E. 1115.

¹⁰ **Alabama.**—Alabama, &c., Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

California.—Wilson v. Nugent, 124 Cal. 280, 57 Pac. 1008.

Georgia.—Green v. Farrar Lumber Co., 119 Ga. 30, 46 S. E. 62.

Louisiana.—Vordenbaumen v. Bartlett, 105 La. 752, 30 So. 219.

Michigan.—Hannah, &c., Mercantile Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52, 7 Det. Leg. N. 470; Blitz v. Fields, 118 Mich. 85, 76 N. W. 119.

New York.—Lawrence v. Dawson, 167 N. Y. 609, 60 N. E. 1115;

Harley v. Hapes-Reeves Const. 584; Wolf v. Mendelsohn, 87 N.
Co., 33 Misc. (N. Y.) 626, 68 N. Y. Y. Supp. 465.
Supp. 191; Riley v. Kenney, 33 Virginia—Schrieber v. Citizens
Misc. (N. Y.) 384, 67 N. Y. Supp. Bank, 99 Va. 257, 38 S. E. 134, 3
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CHAPTER 7.

PROCEEDINGS TO ENFORCE LIENS AND PAY INDEBTEDNESS SECURED THEREBY.

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§ 196. **Generally.**—We have thus far considered the substantive part of the law relating to mechanics' liens. We now come to that branch of the law which has to do with the methods to be pursued to convert the property into money and satisfy the indebtedness secured by the lien. This is the remedial part of the law relating to mechanic's liens. Whatever may be the differences of opinion of the various courts upon the question of the construction of these statutes—whether strict or otherwise—they all agree that the remedial part of the law should receive a liberal construction so as to carry out its purpose and object and that if the mechanic has complied with the statute in such a way as to create a lien on the property they will not, by strict construction, defeat its enforcement. Considering that the right to the lien is statutory and that the procedure varies in the different states, it will be difficult in all cases to give general rules that will be applicable to all the states. The statute in each state must always be consulted and the action brought in conformity thereto. However, the object sought to be accomplished is the same under all the statutes,—that is, the property upon which the labor or materials have been furnished should be held liable to the payment of the same and may be sold and out of its proceeds, such labor or material claims shall be paid. There must, however, be a form of action applicable to the enforcement of the lien under the law of the state in which the action is brought or the remedy will fail.¹ It is well settled that an action brought on the debt does not bar an action on the lien; the remedy on the lien is cumulative, it is only extinguished by a satisfaction of the debt.² The mere fact that the lien covers several pieces of property will not prevent its enforce-

¹ *Kimball v. Moody*, 97 Ga. 549, 25 S. E. 338. No action to persons not included in statute.

Nunnally v. Dorand, 110 Ala. 539, 18 So. 5.

² *Spence v. Etter*, 8 Ark. 69; *Wescott v. Bunker*, 83 Me. 499, 22

ment against one piece or a part of one piece.³ Generally the enforcement of the lien is not of such a common law nature as to require a jury trial but whatever method the statute provides must be followed.⁴ And furthermore as the action is always in rem, the property must be within the jurisdiction of the court or the action will fail.⁵

§ 197. **Kind of action.**—While the proceeding is of a statutory nature, it is generally regarded as being of an equitable character and enforceable in a court of equity,¹ and according to the rules of such court.² And even where the proceeding is regarded as a legal action, yet in order that the remedy may not fail, a court of equity will grant relief if it cannot

Atl. 388; *Palro v. Bethell*, 75 Va. 825.

³ *Mills v. Paul*, (Tex. Civ. App.) 30 S. W. 558.

⁴ *Allen v. Schweigert*, 110 Ga. 323, 35 S. E. 315; *Frost v. Clark*, 82 Iowa 298, 48 N. W. 82; *Ryman v. Lynch*, 76 Iowa 587, 41 N. W. 320.

⁵ Where lands are out of the jurisdiction, the Court cannot affect them otherwise than by proceeding in personam and cannot therefore enforce a mechanic's lien by sale of land out of the jurisdiction. *Chadwick v. Hunter*, 1 Manitoba 363.

¹ *Alabama*.—*Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84.

Colorado.—*Clear Creek, &c., Min. Co. v. Root*, 1 Colo. 374.

Illinois.—*Reed v. Boyd*, 84 Ill. 66; *Clarke v. Boyle*, 51 Ill. 104; *Lomax v. Dore*, 45 Ill. 379; *Ross v. Derr*, 18 Ill. 245.

Mississippi.—*Bowman v. McLaughlin*, 45 Miss. 461.

Oregon.—*Ming Yue v. Coos Bay, &c., R. & Nav. Co.*, 24 Ore. 392, 22 Pac. 641. Facts constituting equitable action only. *Faville v. Hadcock*, 39 Misc. Rep. (N. Y.) 397, 80 N. Y. Supp. 23. Subcontractor. *Bailey Const. Co. v. Purcell*, 88 Va. 300, 13 S. E. 456. "So far as the builder or party contracting a debt is concerned, a suit to enforce a mechanic's lien is an ordinary action in personam, combined with an action quasi in rem to establish and enforce a lien on defined interests in the building and land in question. *Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co.* (N. J. L.), 68 Atl. 215. See §§ 215-217.

² *Illinois*.—*McGraw v. Bayard*, 96 Ill. 146; *Sutherland v. Ryerson*, 24 Ill. 518; *Hamilton v. Dunn*,

be given in a common law court.³ However, in all cases where a court of equity once acquires jurisdiction, it cannot be transferred into an action at law by the act of the defendant in interposing a defense of a common law character.⁴ It is well settled, that the action is not personal but one in rem.⁵ And it is not necessary that the property be seized in order to acquire jurisdiction, the bringing of the suit is sufficient.⁶ Some courts regard the action as an ordinary civil action,⁷ and others a special proceeding,⁸ depending entirely upon the statutes under consideration.⁹

22 Ill. 259; *Shaffer v. Weed*, 8 Ill. 511. See Dec. & Am. Dig. tit. Mechanics' Liens, § 245.

Iowa.—*Greenough v. Wigginton*, 2 G. Greene (Iowa) 435.

Missouri. — *Pittsburgh Plate Glass Co. v. Peper*, 96 Mo. App. 910, 70 S. W. 910. *Kimball v. Cook*, 6 Ill. 423. "The action for a mechanic's lien is not a proceeding against property. It must be commenced as an ordinary action upon account. It must be against some person by name as defendant, and can only be by virtue of a contract with the owner of the land." *Miller v. Hollingsworth*, 33 Iowa 224.

³ The remedy to enforce a mechanic's lien is ordinarily at law; but where the debtor is insolvent, and has left the state, a bill in equity will lie to enforce the lien, and creditors of the debtor might well be made parties to the bill to prevent circuitry of action and for the greater safety of all concerned. *Foust v. Wilson*, 22 Tenn. 31.

⁴ *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865.

⁵ Iowa.—*Simmonson Bros. Mfg. Co. v. Citizens' State Bank*, 105 Iowa 264, 74 N. W. 905.

Maryland.—*Miller v. Barroll*, 14 Md. 173.

New Jersey. — *Washburn v. Burns*, 34 N. J. L. 18; *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273.

New York.—*Marryatt v. Riley*, 2 Abb. N. Cas. (N. Y.) 119.

Wisconsin.—*Dean v. Pyncheon*, 3 Chand. (Wis.) 9.

Federal.—*Homans v. Coombe*, 3 Cranch. C. C. 365, Fed. Cas. No. 6,654.

⁶ *Heldreth v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. 135; *Bernhardt v. Brown*, 118 N. Car. 700, 24 S. E. 527, 36 L. R. A. 402.

⁷ *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625.

⁸ *Hallahan v. Herbert*, 57 N. Y. 409.

⁹ *Taylor v. Tennessee Lumber Co.*, 107 Tenn. 41, 63 S. W. 1130. By attachment. *Warner v. A. H. Yates & Co.*, 118 Tenn. 548, 102

§ 198. **Exclusiveness of remedy provided by statute.**—The action usually provided by statute is not regarded as giving an exclusive remedy; it is merely cumulative, and the debtor may pursue whatever other remedy he may have to secure payment of his debt.¹ And he may at the same time pursue his several remedies for satisfaction of the debt, as by bringing an action in rem against the property and in personam against the person.² However, a remedy that applies only to one particular class of mechanics' liens can not be used for another or a different class.³ The mechanic cannot secure his lien by holding possession of the real estate unless the contract gives him that privilege.⁴ And therefore unlike a common law lien he does not lose his right by surrendering possession, neither does he lose his right by pursuing or bringing

S. W. 92. Provisions of the mechanic's lien act are not to be construed so as to render the remedy thereby provided impossible of enforcement. *Miller v. Calumet Lumber & Mfg. Co.*, 121 Ill. App. 56.

¹ **Arkansas.**—*Murray v. Rapley*, 30 Ark. 568.

Illinois.—*Templeton v. Horne*, 82 Ill. 491; *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539.

Michigan.—*Cady v. Fair Plain Literary Assn.*, 135 Mich. 295. 97 N. W. 680, 10 Det. Leg. N. 725.

Mississippi.—*Ehlers v. Elder*, 51 Miss. 495.

New York.—*Hall v. Bennett*, 16 Jones & S. (N. Y. Super Ct.) 302; *Biershenk v. Stokes*, 18 N. Y. Supp. 854; *Marey v. Larkin*, 2 E. D. Smith (N. Y.) 540.

Texas.—*Lippencott v. York*, 86

Tex. 276, 24 S. W. 275. See Dec. & Am. Dig. tit. Mechanics' Liens, § 246.

² The rule is general, in the absence of some provision to the contrary, that the remedy upon a mechanic's lien and the remedy upon the debt are concurrent and may be pursued at the same time or in succession. (*Phillips, Mechanics' Liens* (3d Ed.) 311; 2 *Jones on Liens*, 1552; *West v. Swasey*, 16 Cal. 141, 76 Am. Dec. 507; *Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395; *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, 616, 23 L. ed. 405; 2 *Jones on Mortgages* (2d Ed.) §§ 1215-1222.) *Hatcher v. Hendrie & Bolthoff Mfg., &c., Co.*, 133 Fed. 267, 68 C. C. A. 19.

³ *Columbus Iron Works Co. v. Loudon*, 53 Ga. 433.

⁴ *Pratt v. Tudor*, 14 Tex. 37.

a common law action.⁵ If he seeks a personal judgment, then the rules relating to the enforcement of that kind of a claim apply.⁶ Of course if there is a privity of contract between the parties and the claim rests on that fact, the showing of the contract will be sufficient, but where the claim rests purely upon the statute, a person must bring himself within the statute even before he can obtain personal judgment.⁷ Where several actions have been consolidated, the non-suiting of one claimant does not affect his right to a judgment against other defaulting defendants.⁸ If the action for a lien against the owner fails a judgment may be rendered against the contractor where the contractor has been joined in the action.⁹

§ 199. Remedy where improvements have been removed.—

The remedy to be pursued when the improvements have been removed from the premises upon which they were originally put, depends upon the particular statute,¹⁰ and as we have before seen there is a division of courts as to whether the lien exists at all.¹¹ This question most usually arises where the relation of landlord and tenant exists and depends largely upon the contract or the lease.¹² As a general rule, it may be said that in the absence of contract the building cannot be removed, if it is so attached to the real estate that the removal will cause permanent injury to the same.¹³

⁵ *Cady v. Fair Plain Literary Assn.*, 135 Mich. 295, 97 N. W. 680, 10 Det. Leg. N. 725.

⁶ *Olson v. O'Malia*, 75 Ill. App. 387; *Booth v. Barron*, 29 App. Div. (N. Y.) 66, 51 N. Y. Supp. 391; *Potvin v. Wickersham*, 15 Wash. 646, 47 Pac. 25. Must have valid claim before he can enforce it. *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32.

⁷ *Gnekow v. Confer*, (Cal.) 48 Pac. 331. See § 287.

⁸ *Kennedy & Shaw Lumber Co. v. Dusenberry*, 116 Cal. 124, 47 Pac. 1008.

⁹ *Marchant v. Hayes*, 120 Cal. 137, 52 Pac. 154; *McMenomy v. White*, 115 Cal. 330, 47 Pac. 109.

¹⁰ *First National Bank of Waterloo v. Elmore*, 52 Iowa, 541, 3 N. W. 547; *Sewall v. Duplessis*, 2 Rob. (La.) 66.

¹¹ See § 186.

¹² See § 141 et seq.

¹³ *Conrad v. Starr*, 50 Iowa

§ 200. **Performance of required conditions.**—The lien claimant must have brought himself within the provision of the statute creating his lien right, and then he must have complied with the conditions bringing the right to a perfected lien, before he can successfully enforce any lien claim.¹ If the statute,² or the contract of the parties requires the performance of some precedent condition³ before the lien can be enforced, such condition must be shown to have been complied with.⁴ As a usual thing no demand is necessary before filing

470; *Schaefer-Meyer Brewing Co. v. Meyer*, 19 Ky. L. R. 411, 40 S. W. 685; *Baker v. Stone*, (Tenn. Ch. App.), 58 S. W. 761.

¹ See Persons entitled to lien, §§ 43-48. See Proceedings to perfect lien. Chapter III. See Dec. & Am. Dig. tit. Mechanics' Liens, § 249.

² *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267. Where a mechanic's lien attaches to a leasehold, the lease to which has been forfeited, the lienholder must, under Code 3443, pay to the lessor "all arrears of rent, or other money, interest, and costs due under the lease," before he can acquire the lessee's right. *Rothe v. Bellingrath*, 71 Ala. 55. Paying taxes, etc. *Glos v. O'Brien Lumber Co.*, 183 Ill. 211, 55 N. E. 712. Under the Michigan law requiring original contractors to furnish the owner of the building a statement under oath of the number and names of the subcontractors or laborers under them, and of the persons furnishing materials, with the amount due each, and providing that un-

til such statement is furnished the contractor shall have no right of action and lien on account of the contract, such statement is a prerequisite to the right to enforce a lien. *Wiltse v. Harvey*, 114 Mich. 131, 72 N. W. 134.

³ "To satisfaction of owner." *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657.

⁴ *Bates v. Trustees of Masonic Hall*, 7 Misc. (N. Y.) 609, 27 N. Y. Supp. 951.

Completion of building.—Where the contract upon which proceedings to enforce a mechanic's lien are based, and which is set out in the complaint, shows that the amount claimed was to become payable upon the completion of the building, and the complaint avers that the building is not completed, judgment for the petitioner must be reversed. The difficulty cannot be cured either by failure to answer or by verdict; the defect not being in the statement, but in the cause of action. *Harmon v. Ashmead*, 60 Cal. 439.

of suit.⁵ Sometimes the contract provides that a certificate of the supervising architect, or other agreed person, must be presented before a payment is due. Where this is the case, the lien can not be enforced until such stipulations have been complied with, waived or executed in the manner provided by law.⁶ Under some statutes it is required that before a payment is made to a contractor, he should give a list or statement to the owner, of all persons having claims against him, and that if he fails so to do he cannot enforce his lien. Where this provision is in force the contractor can not enforce his lien without giving such statement.⁷ It has been held that such a stipulation is only void where there are circumstances sufficient to create an estoppel on the part of the owner.⁸ Under a Missouri statute, it is necessary to notify the owner before suit is brought, and under such statute unless such notice is shown, an action to foreclose can not be maintained.⁹ So, too, there being no privity of contract between an owner and the subcontractor, before such subcontractor can be sustained by suit to enforce his lien right against the owner, he must show that he has performed all the conditions required by the statute.¹⁰ And even if the statute gives him a direct lien he must show that there was a contract between the owner and principal contractor,¹¹ and must establish the fact that he has a debt against the principal con-

⁵ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055.

⁶ See §§ 49, 96. *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Wolf v. Michaelis*, 27 Ill. App. 336; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269.

⁷ *Bonhelm v. Meany*, 43 Ill. App. 532; *Curran v. Smith*, 37 Ill. App. 69; *Martin v. Warren*, 109 Mich. 584, 67 N. W. 897.

⁸ *Sterner v. Haas*, 108 Mich. 488, 66 N. W. 348.

⁹ *Heier v. Meisch*, 33 Mo. App. 35; *Schroeder v. Mueller*, 33 Mo. App. 28; *Cattaberry v. Knox*, 17 App. Div. (N. Y.) 372, 45 N. Y. Supp. 272.

¹⁰ *Reeve v. Elmendorf*, 38 N. J. L. 125. See subcontractor's liens, § 53.

¹¹ *Maxon v. School Dist. No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110.

tractor,¹² for materials or labor furnished within the purview of the principal contract.

§ 201. Compelling and restraining foreclosure proceedings.—

As a general rule it may be said that a party who requires the enforcement of a lien to protect his own interests may file a suit in equity to compel the enforcement of the lien and the adjustment of his own rights.¹ But he must show that he has an interest to be affected injuriously by the continuance of the lien, before he can force foreclosure proceedings or a sale of the property.² If the statute makes a provision for compulsory foreclosure, such provision must be followed.³ So too, a court of equity will not issue a restraining order unless the party has some interest to be injuriously affected or where there is no existing adequate remedy at law. In conformity with this view, it is held that the holder of a junior lien cannot restrain foreclosure by an older lien holder on the mere ground that the times are hard and a better sale might be had in the future.⁴ Where a party having an interest is not made a party to the proceedings to foreclose, he may

¹² *Alabama*.—*May, &c., Hardware Co. v. McConnell*, 102 Ala. 577, 14 So. 768.

Georgia.—*Cumming v. Wright*, 72 Ga. 767.

Iowa.—*Vreeland v. Ellsworth*, 71 Iowa 347, 32 N. W. 374.

Minnesota.—*Lewis v. Williams*, 3 Minn. 151; *Emmet v. Rotary Mill Co.*, 2 Minn. 286.

Missouri.—*Crane Co. v. Hanley*, 53 Mo. App. 540; *Murdock v. Hillyer*, 45 Mo. App. 287.

New Jersey.—*Reeve v. Elmen-dorf*, 38 N. J. L. 125.

¹ *McGraw v. Storke*, 44 Ill. App. 311; *Carpenter v. Jaques*, 2 E. D.

Smith (N. Y.) 571. See *Dec. & Am. Dig. tit. Mechanic's Liens*, § 251.

² *Butler v. Magle*, 2 E. D. *Smith* (N. Y.) 654; *Carpenter v. Jaques*, 2 E. D. *Smith* (N. Y.) 571.

³ *In re Poole*, 14 N. Y. Supp. 790; *Carroll v. Caughlin*, 7 Abb. Pr. (N. Y.) 72; *Borton v. Morris*, 2 Miles (Pa.) 109. See §§ 202, 203.

⁴ *Winn v. Henderson*, 63 Ga. 365; *Wolf v. Glassport Lumber Co.*, 59 Atl. 1105, 210 Pa. 370. When separate suits will be restrained. *Almee Realty Co. v. Haller*, 128 Mo. App. 66, 106 S. W. 588.

have the action restrained until he can come into court and set up his rights and have them protected.⁵ And this has been held true, although he has an action for damages.⁶ But an injunction will not be granted to restrain proceedings where the party asking the same has had an opportunity to plead his defense and has neglected to do so,⁷ or has no interest to be affected.⁸

§ 202. Owner may require lien holder to commence suit—Ohio statute.—Section 3191 of the Ohio statutes provides that the owner of property upon which a lien has been taken to secure any mechanic, laborer, or material man may notify, in writing, the owner of the lien, or his agent or attorney, to commence suit thereon, and if he fails to commence the suit within sixty days after receiving such written notice the lien shall be null and void, but nothing herein contained shall prevent the claim from being collected as other claims are collected by law.¹ The above section gives to the owner a method by which he can clear his property of the lien. Were it not for such provision, it can easily be seen that by delay of the contractor or subcontractor, an owner might very seriously be inconvenienced, in having his property incumbered with a lien placed upon record. The effect of the failure to

⁵ *Raymond v. Ewing*, 26 Ill. 329; *Garretson v. Appleton Mfg. Co.*, 61 Ill. App. 443; *Gates v. Ballou*, 56 Iowa 741, 10 N. W. 258. Under Indiana Statutes, providing that a person having a mechanic's lien may enforce it by suit within a year, and if it be not enforced within that time it shall be null and void, mortgagees, who are necessary parties, not having been made parties to the action to enforce the lien, may, the year for suit having expired, enjoin sale under the de-

cree foreclosing the lien. *Martin v. Berry*, 159 Ind. 566, 64 N. E. 912. To prevent multiplicity of suits. *Aimee Realty Co. v. Haller*, 128 Mo. App. 66, 106 S. W. 588.

⁶ *Hammond v. Martin*, (Tex.) 40 S. W. 347.

⁷ *Patch v. Collins*, 158 Mass. 468, 33 N. E. 567.

⁸ *Bond v. Carroll*, 71 Wis. 347, 37 N. W. 91.

¹ 197 Ohio Laws 500. Section under previous Ohio law was numbered 3197.

commence a suit on the lien is to release the property from the lien. If the claimant had any rights against any one personally, these rights would be reserved. The statute should be strictly followed, and the following might be observed in giving the notice: The notice must be served personally on the lienor, his agent or attorney and should be made with such publicity, or in such manner, as to be readily proved. A copy of the notice so served and a memorandum indorsed of time, place and manner of service, is more convenient and the best precaution against errors of memory in reference thereto. The notice may be in this form:

Springfield, O., ..., 19...

A. B—, Dear Sir:

You are hereby notified to commence suit on the lien you claim to own and have taken upon my property in this city, as appears of record in Vol., page, of mechanic's lien records of Clark County, Ohio, as required by law, within sixty days.

(Signed.)

MEMORANDA ON RETAINED COPY.

Delivered a copy of the above notice to A. B. (or his authorized agent) personally, on the day of, 19..., at his residence on 172 E. High Street, Springfield, Ohio.

(Signed by person serving notice.)

Dated, 19...

§ 203. **Owner may require lien holder to commence suit—Indiana statute.**—Section 8303 of the Indiana statute as amended and re-enacted by the legislature in 1909 is as follows: The owner of property upon which a mechanic's lien has been taken may notify, in writing, the owner or holder of the lien to commence suit thereon, and if he fails to commence such suit within ninety days after receiving such notice, the lien shall be null and void; but nothing herein contained shall pre-

vent the claim from being collected as other claims are collected by law.² A form of notice of the tenor and effect of that set forth in the preceding section will satisfy the statutory requirements. But the affidavit of the person who served the notice, stating that fact, and sworn to before an officer authorized to administer oaths should be attached.³

§ 204. **Different liens joined in the same foreclosure proceeding.**—It is a general rule that parties cannot be joined in the same proceeding, unless they are jointly interested and in case of foreclosure of mechanics' liens, that the parties are jointly entitled to a lien on the same premises.¹ But considering the desirability of avoiding a multiplicity of suits, courts are inclined to permit everybody to come in, so that the rights of all persons may be determined in one proceeding. Of course to entitle them to come in all must be interested in the enforcement of a lien which comes within the statute.² Some statutes require that all parties claiming

² Acts 1909 p. 298, § 9.

³ Burns R. S. 1908, § 504.

¹ Bush v. Connelly, 33 Ill. 447. A subcontractor cannot join items for work done under a contract with a contractor, and also items for work done under a contract with the owner. Robinson v. Davis, 8 Del. (Pa.) 237. Mechanics cannot bring a joint suit. Oldfield v. Barbour, 12 Pr. R. (Ont.) 554. The rule against splitting demands does not apply. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 S. W. 588. See Dec. & Am. Dig. tit. Mechanics' Liens, § 252.

² Alabama. — Alabama State Fair, &c., Assn. v. Alabama Gas

Fixture, &c., Co., 131 Ala. 256, 30 So. 26.

California. — Barber v. Reynolds, 33 Cal. 494.

Illinois.—Thielman v. Carr, 75 Ill. 385.

Minnesota.—Mensel v. Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

New York.—McDermott v. McDonald, 18 Jones & S. (N. Y. Super Ct.) 153.

Washington.—Washington Rock Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. 115. The lien law of 1889, which provides that a second action shall not be brought where one is already pending to foreclose mechanics' liens on property affected by several lien claims, but if such ac-

liens must come into one action and have their rights settled.³ If separate suits are brought where the lien is sought to be enforced by several parties on the same property, the court as a general rule on motion will consolidate them.⁴ However, this rule applies only to land held by one person. If liens are sought on property owned by different persons, they will not be consolidated and can not ordinarily be brought in one action.⁵ An exception to this will be found in a case where one structure extends over the lands of several persons and is erected under one contract.⁶ But the fact that materials are furnished to different contractors will not prevent the subcontractor from enforcing all his rights in one action.⁷ Where the court has ordered actions to be consolidated or different claims have been brought in by way of interpleader, the action is thereafter treated as a single action, and a single set of findings and judgments may be had,⁸ but if separate findings are made, it will not be error.⁹ The rights of all parties in such case should be heard and determined before an order of sale is made.¹⁰ Each claim should be tried on its merits and should not be prejudiced by testimony given on the hearing of an-

tion is brought it must be consolidated with the first action, is a mere regulation of practice, and does not make the second action void. *Miller v. Condit*, 52 Minn. 455, 55 N. W. 47.

³ *Miller v. Condit*, 52 Minn. 455, 55 N. W. 47.

⁴ *Moran v. Murray Hill Bank*, 58 N. Y. Super. Ct. 199, 9 N. Y. Supp. 715; *Graff v. Rosenbergh*, 6 Abb. Pr. (N. Y.) 428; *Allis v. Meadow Springs Distilling Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

⁵ *John v. Algor*, 65 N. J. L. 363, 47 Atl. 571; *Butler v. Rivers*, 4 R. I. 38.

⁶ *Kinney v. Mathias*, 81 Minn. 64, 83 N. W. 497; Lienable and non-lienable items cannot be joined in an action. *Baker v. Fessenden*, 71 Me. 292.

⁷ *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685. *Contra. Dugan v. Higgs*, 43 Mo. App. 161.

⁸ *Willamette Steam Mills Lumbering, &c., Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629.

⁹ *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164.

¹⁰ *Power v. McCord*, 36 Ill. 214.

other.¹¹ If it is found necessary to sell, an order of sale may be made, and the rights of a subcontractor may be determined, although there may be some undetermined matter still existing between the owner and contractor.¹² Pre-existing liens must be taken into consideration in determining what is due upon junior liens.¹³ The fact that the original petitioner might fail on his claim,¹⁴ or should decide to withdraw the same,¹⁵ or the same is paid,¹⁶ will not affect the right of an intervening or other party properly in the action, to have the same pursued to a final determination.¹⁷

§ 205. **Defenses.**—Where the ordinary rules of pleading will apply, as a matter of course a defendant may set up as many defenses as he has. It being a statutory right, it is incumbent upon the claimant to show that all conditions of the statute granting the lien have been at least substantially complied with, if not, the action will fail. Further it must be shown that the debt has not been paid.¹ It is no objection to the claim of a subcontractor that the principal contractor had no power, under its charter to contract, as a corporation.² Generally the fact that non-lienable items are mingled with lienable ones, if they are separate will not be a good defense

¹¹ *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325.

¹² *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709.

¹³ *Cronk v. Whittaker*, 1 E. D. Smith (N. Y.) 647.

¹⁴ *Johnson v. Keeler*, 46 Kan. 304, 26 Pac. 728; *Elliot v. Ivers*, 6 Nev. 287; *Morgan v. Taylor*, 15 Daly (N. Y.) 304, 5 N. Y. Supp. 920.

¹⁵ *Morgan v. Stevens*, 6 Abb. N. C. (N. Y.) 356.

¹⁶ *Wilson v. Niagara City Land Co.*, 79 Hun (N. Y.) 162, 29 N. Y. Supp. 517.

¹⁷ *Angler v. Bay State Distilling Co.*, 178 Mass. 163; *Sandberg v. Palm*, 53 Minn. 252, 54 N. W. 1109; *Abham v. Boyd*, 5 Daly (N. Y.) 321; *Noar v. Gill*, 111 Pa. 488, 4 Atl. 552. Claim of principal barred. *Burns v. Phinney*, 53 Minn. 431, 55 N. W. 540.

¹ See *Payment*, § 189. *Lehretter v. Koffman*, 1 E. D. Smith (N. Y.) 664, 1 Code R. (N. S.) (N. Y.) 284. See *Dec. & Am. Dig. tit. Mechanics' Liens*, § 253.

² *General Fire-Extinguisher Co. v. Magee Carpet Works*, 199 Pa. 617, 49 Atl. 366.

against the lien.³ If inseparable, however, the entire lien will fail. A secret contract between the owner and the person in possession who contracts for the building that it was not to exceed a certain amount, will be no defense to a lien covering an excess.⁴ If a grantee in a trust-deed mortgage reserves sufficient to meet all liens, although the liens may be invalid, yet if the material or work were furnished, he can not set up as a defense that the lien was not valid, having reserved sufficient to meet the same, he is not injuriously affected by such allowance.⁵ The fact that the lien claim is charged to more individuals than ought to be, provided the same is not done fraudulently,⁶ or that the lien claim has immaterial omissions,⁷ or that a building in a city has not been erected according to the city ordinance,⁸ or that the filing of a lien destroys the credit of the contractor, so that he cannot proceed with his work,⁹ or that the plaintiff has shown that his claim is a set-off in another action pending,¹⁰ or that there is an action pending on the debt,¹¹ or that more notices have been filed than are necessary,¹² or that an insufficient tender has been made,¹³ or that one abutting street owner has paid

³ *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535.

⁴ *Fischer v. Jordan*, 169 N. Y. 615, 62 N. E. 1095.

⁵ *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989.

⁶ *Interstate Building, &c., Assn. of Bloomington v. Ayers*, 177 Ill. 9, 52 N. E. 342. The defendants therefore have a right to show, if they can, that the plaintiff was engaged in the conspiracy to defraud them by the enforcement of its lien. *Bohn Mfg. Co. v. Keenan*, 15 S. D. 377, 89 N. W. 1009.

⁷ *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965.

⁸ *Anderson v. Carlson*, 99 Ill. App. 514.

⁹ *Mull v. Jones*, 18 N. Y. Supp. 359.

¹⁰ *Cremén v. Byrnes*, 4 E. D. Smith (N. Y.) 756; *Ohlinger v. Phillips*, 2 Woodw. Dec. (Pa.) 53.

¹¹ *Culver v. Elwell*, 73 Ill. 536; *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367; *Gridley v. Rowland*, 1 E. D. Smith (N. Y.) 670.

¹² *Clarke v. Heylman*, 80 App. Div. (N. Y.) 572, 80 N. Y. Supp. 794.

¹³ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055.

more than he is properly charged with,¹⁴ are not good defenses to the lien. So the fact that the building contract stipulates that sufficient may be withheld to meet claims,¹⁵ will not be a good defense. So the fact that the owner notified the material man that the building would not be liable for a lien will not prevent the subcontractor from recovering on his lien, there being no defense that he exhausted the entire amount due to the contractor.¹⁶ That certificates of money due have been assigned will be no defense.¹⁷

§ 206. **Contractor to defend action—Ohio statute.**—Section 3184e of the Ohio statute provides that in all cases where a lien shall be filed, under the provisions of this act, by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property, upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and costs, and if he shall have settled with the contractor in full, shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally the party liable.¹⁸

¹⁴ *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135.

¹⁵ *Perry v. Levenson*, 178 N. Y. 559, 70 N. E. 1104.

¹⁶ *Seward v. Mathers*, 8 Kulp, (Pa.) 330; *Hill v. La Crosse & M. R. Co.*, 11 Wis. 204. It is no defense to the foreclosure of a material man's lien that other material men may claim liens which if added to that claimed in

the foreclosure suit and the payments properly made to the contractor would exceed the contract price. *Tuck v. Moss Mfg. Co.*, 127 Ga. 729, 56 S. E. 1001.

¹⁷ *Iowa Brick Co. v. City of Des Moines*, 111 Iowa 272, 82 N. W. 922. When owner not estopped. *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589.

¹⁸ Act April 15, 1889; 86 Ohio Laws 373, 374.

§ 207. **Defenses—Want of title.**—In an action to enforce a subcontractor's lien, the owner may set up as many defenses as he has against the principal contractor.¹ If the contractor does not pay the subcontractor because the owner does not pay him, it is no defense that the principal contract provided that there were to be no liens.² It is not a defense that the property is in the hands of a receiver. In such case, however, the remedy must be worked out through that official.³ Neither is it a defense that the elements prevented a compliance with the contract.⁴ It cannot be urged as a defense to the lien that it was opposed to public policy if the part of the contract open to this defense was not performed.⁵ However, if the entire contract is void as against public policy no lien can be enforced. As between an owner and a lessee the fact that part of the material was used on the part sublet to another person will be no defense to the lien, where the lessee has power to make the improvement.⁶ As a general rule it may be said that it is not a defense that

¹ *Smith v. Wilcox*, 44 Ore. 323, 74 Pac. 708; *Seeman v. Blemann*, 108 Wis. 365, 84 N. W. 490.

² *Weber v. Hearn*, 49 App. Div. (N. Y.) 213, 63 N. Y. S. 41; *Springer Land Assn. v. Ford*, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. 170.

³ *Richardson v. Hickman*, 32 Ark. 406.

⁴ "This failure to perform they attempted to excuse by testimony that the shingles were ordered in the West, and that they were disappointed by reason of storms. It was not provided, however, that they might set off their disappointment against the disappointment of their customer, whom they failure to perform what they had undertaken without re-

serve caused severe loss, direct and consequential." *Woolf v. Schaefer*, 41 Misc. Rep. (N. Y.) 640, 85 N. Y. Supp. 205. See loss of lien, § 186.

⁵ An agreement between material men and the contractor that, if the latter would take no defense to the sci. fa., the former would look to the building alone, and discharge him of personal liability, is contrary to the policy of the law and void, and hence is no defense to an action between the contractor and material man. *Young v. Burtman*, 1 Phila. (Pa.) 203, 8 Leg. Int. (Pa.) 106.

⁶ *Montpelier Light & Water Co. v. Stephenson*, 22 Ind. App. 175, 53 N. E. 444.

the defendant had no title, since the claim can be enforced only on the title he has.⁷ It follows that it is not a defense that someone else holds a paramount title.⁸

§ 208. **Defenses—Waiver and estoppel.**—A person who fraudulently conveys title to another, can not plead such want of title to defeat a lien against a grantee whom he permitted to be held out as the apparent owner.⁹ And a person may generally be estopped by his conduct from raising a defense that he otherwise had, but he should not be held to waive a formality that is necessary to perfect a mechanic's lien against him, unless it clearly appears from the evidence that he actually intended to waive it, or his conduct is such as clearly estops him from asserting the contrary.¹⁰ Thus, where an owner induced a material man to furnish materials by making him believe that there were funds in his hands due the principal contractor that could be held at the time the inducement was made, it was held that the owner could not set up a defense against the same, where the time for perfecting the lien had passed.¹¹ Merely saying however that he would accept an order of the contractor, does not mean that the owner has sufficient funds or that he will

⁷ *Ford v. Wilson*, 85 Ga. 109, 11 S. E. 559; *Porter v. Wilder*, 62 Ga. 520; *Ainsworth v. Atkinson*, 14 Ind. 538; *Lane v. Snow*, 66 Iowa 544, 24 N. W. 35.

⁸ *Cook v. Goodyear*, 79 Wis. 606, 48 N. W. 860.

⁹ *West v. Badger Lumber Co.*, 56 Kan. 287, 43 Pac. 239. The fact that he attempted to subject the interest of another will not estop him from asserting his rights. *J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co.*, (N. J. L.) 68 Atl. 215.

¹⁰ *Floyd v. Rathledge*, 41 Ill.

App. 370. In foreclosure of a mechanic's lien, a recital in the lien that the lien contract was executed prior to the delivery of the material, being set up to stop defendants from asserting homestead rights, it was competent for them to show that they did not know that it contained such recital. *Kribs v. Craig*, (Tex. Civ. App.) 60 S. W. 62. Cannot falsify former statements. *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. 744.

¹¹ *McConnell v. Worns*, 102 Ala. 587, 14 So. 849.

pay the order.¹² So the mere fact that a grantee purchases property "subject to all liens" does not estop him from defending against liens,¹³ unless the claim was then pending in court or had been reduced to judgment.¹⁴ All persons properly made parties to a suit relating to the subject matter of the lien, are estopped from afterwards setting up their claims. They must set them up in the action to which they are made parties.¹⁵

§ 209. **Defense of set-off and counterclaim**—Owing to the wide difference in the statutes and procedure of the various states,¹ it is almost futile to attempt to set down a general rule as to the right and method of setting up the defense of

¹² Pike v. Irvin, 3 N. Y. Super Ct. 14.

¹³ Jones v. Manning, 6 N. Y. Supp. 338, 25 N. Y. St. 771.

¹⁴ Hendrickson v. Norcross, 19 N. J. Eq. 417.

¹⁵ Julien Gaslight Co. v. Burley, 11 Iowa 520; Hannah & Law Mercantile Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120; James v. Davidson, 81 Wis. 321, 51 N. W. 565.

Homestead right.—A note recited that it was given "in payment for work and material used and to be used on my homestead in Live Oak Grove," and was declared to be a mechanic's lien on the land and improvements. The note was in fact given to raise money to improve the land, which was unimproved. The recital did not make the land a homestead, thus rendering void an alienation without the wife's consent, and the maker was estopped to deny, as against an innocent purchaser for value, that it rep-

resented a valid mechanic's lien. Bunton v. Palm, (Tex.) 9 S. W. 182. Where lienors were not parties to a prior mechanic's lien claim, such prior claim was no defense to a subsequent claim seeking to subject their interests to the payment thereof. J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co., (N. J. L.) 68 Atl. 215.

¹ The practice is governed by the act which provides it and not by the Code. It is a statutory proceeding, intended to enforce a specific statutory right, and it is appropriate only where that right is in question. Its character, nature and mode of procedure, therefore, depend upon the act which affords it. The extent of the remedy afforded by the act is to enforce the lien upon the property covered. Tenny v. Anderson Water, Light & Power Co., 67 S. Car. 11, 45 S. E. 111. See Dec. & Am. Dig. tit. Mechanics' Liens, § 254.

set-off or counterclaim, but in most of the states it is recognized that a counterclaim can be set up as a matter of defense.² And so may a set-off so long as it only affects the original parties.³ However, if the rights of third parties intervene, a general debt cannot be set off.⁴ If at the time the contract for the building was entered into or the lien right attached,

² **Indiana.**—*Bird v. Rector of St. John's Episcopal Church of Elkhart*, 154 Ind. 138, 56 N. E. 129.

New Jersey.—*Norton v. Sinkhorn*, 61 N. J. Eq. 508, 50 Atl. 506.

New York.—*Grogan v. Raphael*, 6 Abb. Pr. (N. Y.) 306; *Grogan v. McMahon*, 4 E. D. Smith, (N. Y.) 754.

Washington.—*Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712. Is not a counterclaim. *McQuaide v. Stewart*, 48 Pa. St. 198.

Assignment of money due.—When the contractor assigns all the money due on a building contract to a lumberman, who had furnished material, and who had primarily brought suit without making the contractor a party, the owner can plead such cause of action as a counter-claim. *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707. Under Code Civ. Proc. Mont. 691, defining a counter-claim as a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, orders on the property owner to laborers, given by the contractor for work done in the removal of buildings, are properly pleaded as counter-claims in an action by the con-

tractor or his assignees to foreclose a lien for the contract price of such removal. *Boucher v. Powers*, 29 Mont. 342, 74 Pac. 942. A builder sued under the mechanic's lien act may not set off claims due to him from plaintiff in a different right. By claims that are "due in a different right" is meant debts that have accrued in transactions other than that in which the plaintiff has filed and upon which his action is based. *Naylor v. Smith*, 63 N. J. Law, 596, 44 Atl. 649. The owner may set off actual damages which he has sustained by the contractor's failure to complete the building where they are such as may be said to have been in contemplation of the parties when the contract was made. *Fossett v. Rock Island Lumber, &c., Co.*, 76 Kan. 428. 92 Pac. 833.

³ *Gable v. Parry*, 13 Pa. St. 181; *Owens v. Ackerson*, 1 E. D. Smith (N. Y.) 691. Meaning of set-off. *Builders' Supply Depot v. O'Connor*, 15 Cal. 265, 88 Pac. 982.

⁴ *Hoyt v. Miner*, 7 Hill, (N. Y.) 525; *Develin v. Mack*, 2 Daly (N. Y.) 94; *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737.

the contractor was indebted to the owner in a greater sum than the amount that might be due him under the building contract, this may be pleaded to defeat the claim of the material man. This would be considered as in the nature of a payment without notice of the claim of the subcontractor.⁵ This might not be permitted under some statutes. However where a subcontractor brings an action to foreclose a lien against the contractor, his sureties, and the owner of the land, the contractor is the primary debtor and he may set up a counterclaim though it is only in his favor and does not affect the other defendants.⁶ Of course here as elsewhere, the owner may be estopped by his conduct from asserting claims beneficially attaching and if he should accept a building he can not claim damages for imperfect work.⁷ Likewise an owner can not claim credits for payments to subcontractors which he has not actually made.⁸ But if there are several properties and the owner pays on one, he may recoup or set up such payment to the claim asserted on the others where it does not injuriously affect other parties.⁹

§ 210. Defenses—Damages by reason of default of contractor.—It is not usually necessary to show on the part of a

⁵ *Stark v. Simmons*, 54 Ohio St. 435, 43 N. E. 999; *Brackney v. Turrentine*, 14 Ark. 416.

⁶ *Wescott v. Bridwell*, 40 Mo. 146. *Cody v. Turn Verein*, 167 N. Y. 607, 60 N. E. 1108, also 48 App. Div. (N. Y.) 279, 64 N. Y. Supp. 219.

⁷ *Hannah, &c., Mercantile Co. v. Hartzell*, 125 Mich. 177, 84 N. W. 52, 7 Det. Leg. N. 470. Where, in an action for architect's services, defendant pleaded and attempted to show full payment at a time when damage by reason of improper work alleged in a coun-

ter claim existed, defendant was thereby estopped to urge such damages in reduction of the contract amount so alleged to have been voluntarily paid in full. *Spalding v. Burke*, 33 Wash. 679, 74 Pac. 829. Cannot claim rent if he waives right to insist on completion of building. *Kotcher v. Perrin*, 148 Mich. 690, 113 N. W. 284, 14 Det. Leg. N. 593.

⁸ *Wightman v. Brenner*, 26 N. J. Eq. 489.

⁹ *Moore v. Culbertson*, 3 Walk (Pa.) 448.

material man that all the material went into the building so long as his claim comes within the contract price between the owner and contractor, and the owner cannot counterclaim in such case for materials not actually used in the building.¹ So long as only the rights of the owner and principal contractor are to be considered, damages resulting from the default of the contractor can always be set up as a defense.² In all cases where subcontractors bring an action or are interested in a suit, they are bound by the terms and conditions of the original contract and will, unless their claims have in some manner become fixed against the owner, be subject to the same defenses that may be made against the principal contractor.³ The mere fact that materials were received at the building will not estop the owner or purchaser from claiming damages if they were defective.⁴ But if the owner settles in full with a contractor and reserves sufficient

¹ *Boucher v. Powers*, 29 Mont. 342, 74 Pac. 942; *Sierra Nevada Lumber Co. v. Whitmore*, 24 Utah 130, 66 Pac. 779; *Spears v. De Rant*, 76 S. Car. 19, 56 S. E. 652.

² *District of Columbia*.—*Burn v. Whittlesey*, 2 MacArthur, (D. C.) 189.

Missouri.—*McAdow v. Ross*, 53 Mo. 199.

Nebraska.—*Hoagland v. Van Etten*, 22 Neb. 681, 35 N. W. 869.

New York.—*Bulkly v. Healy*, 12 N. Y. Supp. 54, 34 N. Y. St. 630; *Gourdier v. Thorp*, 1 E. D. Smith (N. Y.) 697.

Pennsylvania.—*Taylor v. Murphy*, 148 Pa. 337, 23 Atl. 1134, 30 W. N. Cas. 27, 33 Am. St. Rep. 825; *Bayne v. Gaylord*, 3 Watts, (Pa.) 301. Liquidated damages. *Tenney v. Anderson Water, Light & Power Co.*, 69 S. Car. 430, 48 S.

E. 457. A court of equity is controlled mainly by considerations of right and justice between the parties, and it follows the law, and may, in a proceeding for a mechanic's lien, allow something for what is deemed insufficient work while decreeing for the amount found equitably due. *Heberlein v. Wendt*, 99 Ill. App. 506.

³ Surety on bond of contractor is a material man, the owner may set up damages on breach of conditions of bond. *Hartman v. Berry*, 56 Mo. 487; *Deltz v. Leete*, 28 Mo. App. 540; *Reeve v. Elmen-dorf*, 38 N. J. L. 125; *Winder v. Caldwell*, 14 How. (U. S.) 434, 14 L. ed. 487.

⁴ *Strawn v. Cogswell*, 28 Ill. 457.

to pay subcontractors, he cannot claim any defense against subcontractors for the failure of the principal to properly perform the contract.⁵ Contractors can only claim by virtue of the statute and they cannot assert a beneficiary right to a clause in a contract providing for a penalty for the failure to properly perform the contract. This matter of penalty will be construed to be a right belonging to the owner only.⁶ Neither can a subcontractor or material man claim any interest in a clause in a contract providing for damages to the owner, if improperly performed.⁷ Damages are not a kind of property that can be asserted or covered by mechanics' liens.⁸

§ 211. Who entitled to bring action to foreclose.—The person to whom the debt is due is the real party in interest and as such has a right to bring an action to foreclose the lien. It is generally recognized that such claims are assignable,¹ and hence a person to whom a claim is properly assigned can enforce the same.² An assignee for the benefit of creditors, a receiver, and a surety on a contractor's bond have been held to have such an interest as would entitle them to foreclose the lien claim.³ It is the rule that the real person in interest may bring the action and that a person who may be affected by an order or a decision in the action may defend the same.⁴ The courts will not recognize anybody to make a defense who can-

⁵ Cook v. Rome Brick Co., 98 Ala. 409, 12 So. 918.

⁶ Toledo Novelty Works v. Bernheimer, 8 Minn. 118.

⁷ Schuyler v. Hayward, 67 N. Y. 253.

⁸ See §§ 23, 66, 293.

¹ See assignment of lien, § 165. See Dec. & Am. Dig. tit. Mechanics' Liens, § 255.

² Corporation exceeding its powers cannot. Dalles Lumber, &c., Co. v. Wasco Woolen Mfg. Co., 3 Ore. 527.

³ Curtis v. Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314; Fullerton Lumber Co. v. Gates, 89 Mo. App. 201.

⁴ A prior mortgagee. Walker v. Hauss-Hijo, 1 Cal. 183. McAdam v. Bailey, 1 Phila. (Pa.) 297, 9 Leg. Int. (Pa.) 30. The assignee of a claim secured by builder's lien is entitled to be substituted as plaintiff in foreclosure at any time before decree. Fischer v. Hanna, 8 Colo. App.

not be injuriously affected by anything the court may legally do in the action as brought.⁵ But it has been held that one who is either the owner at the time the lien attaches or at the time it is sought to enforce the same will have sufficient interest to give him a right to contest the same.⁶ As a subcontractor's claim is deducted from what is due the principal contractor it naturally results that such principal contractor may contest the lien or claim of a subcontractor and lessen or defeat the same if he can.⁷ But the contractor may only set up such matters as will affect him injuriously. He cannot set up a claim that the lien did not properly describe the premises. This is not a matter which injuriously affects him; it is a defense for the owner.⁸ If the statute requires subcontractors to contest within a certain time, they must do so or lose their right.⁹

471, 47 Pac. 303. Owner of property. *Thomas v. Turner*, 16 Md. 105; *Thaxter v. Williams*, 31 Mass. 49. Adverse lienholder. *Wiltzie v. Harvey*, 114 Mich. 131, 72 N. W. 134. Grantee. *Toop v. Smith*, 87 App. Div. (N. Y.) 241, 84 N. Y. Supp. 326. Lien creditors. *Knabb's Appeal*, 10 Pa. St. 186, 51 Am. Dec. 472; *In re Wells' Estate*, 2 Del. Co. (Pa.) 172. When purchaser cannot. *Michigan Savings & Loan Assn. v. Attebery*, 16 Tex. Civ. App. 222, 42 S. W. 569. Duty of party in interest to defend against unjust claims. *Vandenberg v. P. T. Walton Lumber Co.*, (Okla.) 92 Pac. 149.

⁵ *Lake Shore & M. S. R. Co. v. McMillan*, 84 Ill. 208; *Gogel v. Mickow*, 11 Minn. 475.

⁶ *Bell v. Bosche*, 41 Neb. 853, 60 N. W. 92; *Grove v. Lewis*, 17 Pa. Co. Ct. 452, 26 Pittsb. Leg. J. (Pa.) 384.

⁷ *Flanagan v. O'Connell*, 88 Mo. App. 1; *Clark v. Brown*, 22 Mo. 140.

⁸ *Wethered v. Garrett*, 140 Pa. 224, 21 Atl. 319, 27 W. N. C. (Pa.) 451.

⁹ *McConologue v. Larkins*, 32 Misc. (N. Y.) 166, 66 N. Y. Supp. 188. Held, "that plaintiff in error, as assignee of one Yaeger, a contractor, acquired by assignment and has only such rights as Yaeger, the assignor, had at the time of the assignment. That by the statute on mechanic's liens, Yaegar was precluded from disputing the amount or validity of Wunker & Rehsteiner's lien, and claim by his failure to proceed under the statute, sections 3199 and 3200, to contest it, hence his assignee, Fox, is precluded here from contesting it." *Fox v. Wunker*, 18 Ohio Cir. Ct. 610.

§ 212. **Venue of action or jurisdiction of court.**—The action being one in rem, only that court has jurisdiction which has general jurisdiction over the place or locality in which the structure is located upon which it is sought to foreclose the lien.¹ And no action can be brought in any state or territory in which the structure is not located. If the court once rightfully assumes jurisdiction it will retain the suit until finally terminated.² If property has been seized by the United States courts prior to commencement of the action the lien must be worked out through such courts.³ The statutes generally designate the particular courts, subject to the above general rules, that may properly exercise jurisdiction in the foreclosure of liens. It is to be noted, however, that the action is analogous to the foreclosure of a mortgage, and such suits are generally brought in courts of record exercising chancery powers.⁴

¹ *Boyle v. Gould*, 164 Mass. 144, 41 N. E. 114; *Guerrant v. Dawson*, 34 Miss. 149; *Mathews v. Helsler*, 58 Mo. App. 145; *Rayson v. Horton*, 90 Wis. 367, 63 N. W. 278. See Dec. & Am. Dig. tit. Mechanics' Liens, § 259.

² *Rogers, &c., Hardware Co. v. Cleveland Bldg. Co.*, 132 Mo. 442, 32 S. W. 1. If proceedings in bankruptcy are afterwards brought this might remove the action to the United States Court.

³ The res was thereby drawn into the exclusive jurisdiction and dominion of the United States; and, for the purpose of that suit, it was at the same time, withdrawn from the jurisdiction of the courts of New Jersey. Any proceeding against it, involving the control and disposition of it, in the latter, while in that condition, was as if it were a proceeding against the property in an-

other state. It was vain, nugatory and void, and, as against the proceedings a judgment of the district court of the United States, of those claiming under them, was without effect. *Heldritter v. Elizabeth Oilecloth Co.*, 6 Fed. 133.

⁴ *Colorado*.—*Weiner v. Rumble*, 11 Colo. 607, 19 Pac. 760.

Florida.—*Futch v. Adams*, 47 Fla. 257, 36 So. 575.

Missouri.—*Hammond v. Barnum*, 13 Mo. 325.

Maryland.—*Miller v. Barroll*, 14 Md. 173.

New York.—*Raven v. Smith*, 148 N. Y. 415, 43 N. E. 63.

Rhode Island.—*Blackmar v. Sharp*, 23 R. I. 412, 47 Atl. 593. Justice of the peace has none. *White v. Millbourne*, 31 Ark. 486; *Noss v. Cord*, 1 Wis. 389. Circuit court. *Stout v. Sower*, 22 Ill. App. 65. Common pleas has none. *Gelston v. Thompson*, 29 Md. 595.

Whether or not proceedings should be brought in an equity court, or in one of common law jurisdiction, depends largely upon the statute and the procedure in vogue in the particular states. Some courts hold that the proceeding is purely statutory and that the action should be brought on the law side of the court.⁵ Other courts hold that law and equity courts have concurrent jurisdiction,⁶ and that the person bringing the action may choose which court he would bring the action in.⁷ But the proceedings and relief demanded are of such a strong equitable character that the prevailing opinion is that the action should be brought in a court of equity.⁸ And even where it is held that the action should be brought in a common law court, if such court cannot give complete relief, then it should in all cases be brought in the equity court.⁹ Where by statute the amount in controversy determines the jurisdiction, the fact that the amount claimed is above the sum fixed by law, will give the court jurisdiction, even if upon suit

District court in New York has none. *Egan v. Laemmle*, 5 Misc. (N. Y.) 224, 25 N. Y. Supp. 330. Common pleas has none. *Noyes v. Burton*, 29 Barb. (N. Y.) 631, 17 How. Pr. (N. Y.) 449. Justice of the peace has when under \$200. *Finger v. Hunter*, 130 N. Car. 529, 41 S. E. 890. District court. *Noyes v. Smith* (Tex. Civ. App.), 77 S. W. 649. District court. *Jarrell v. Block* (Okla.), 92 Pac. 167.

⁵ *Walker v. Daimwood*, 80 Ala. 245; *Cole v. Colby*, 57 N. H. 98.

⁶ When a right is solely and exclusively of legislative creation, when it does not derive existence from the common law, or from the principles prevailing in courts of equity, and jurisdiction of it is

limited to particular tribunals and specific, peculiar remedies are provided for its enforcement by the statute, it can be exercised and pursued only before the tribunals, and in the mode the statute provides. *Chandler v. Hanna*, 73 Ala. 390; *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S. W. 409.

⁷ *Hobbs v. Spielberg*, 3 Johns (N. Mex.) 222, 5 Pac. 529.

⁸ *Andrews v. Washburn*, (Miss.) 3 Sm. & M. 109; *Straus v. Finane*, 3 Johns (New Mex.) 260, 5 Pac. 729; *Finane v. Las Vegas Hotel & Improvements Co.*, 3 Johns (New Mex.) 256, 5 Pac. 725.

⁹ *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; *Chandler v. Hanna*, 73 Ala. 390; *Coleman v. Freeman*, 3 Ga. 137.

it is found that a less sum should have been demanded.¹⁰ So, too, it is held as a general rule that if the court properly has jurisdiction as an incident to its power it may declare fraudulent a transfer intended to defeat the lien.¹¹ But there can be no jurisdiction over a person unless there is either actual or constructive service.¹² And to have jurisdiction in rem, such services by attachment or otherwise must be had as the statute provides, and there can be no judgment rendered in personam without personal service.¹³

§ 213. Limitation of action to enforce lien.—As a general rule the mechanic's lien statutes fix the time within which an action of foreclosure shall be brought, and, as a matter of course, if the action is not brought within that time it will fail.¹ When the case clearly is not within the statutory limit, considerations of equity will not prevail over the statute and

¹⁰ *Haberzettle v. Dearing*, (Tex. Civ. App.) 80 S. W. 539. Separate demands cannot be aggregated to equal sum necessary. *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785.

¹¹ The court has the same power in mechanic's lien cases that the other courts of record exercise. They proceed alike under the same statute to attain the same end. The defendants plead the transfers in defense, and, like a general release or other document, pleaded in bar of a recovery, the court may in a proper case, and even in a common-law action, adjudge such instruments to be void so as to destroy their effect as a defense. The action is to foreclose the lien, and declaring fraudulent a transfer intended to defeat the lien is an incident to the jurisdiction necessary

to make it effective. *Murray v. Gerety*, 11 N. Y. Supp. 205, 25 Abb. N. Cas. (N. Y.) 161.

¹² *Jepherson v. Green*, 22 R. I. 276, 47 Atl. 599; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996.

¹³ *Meyers v. Le Poidevin*, 9 Neb. 535, 4 N. W. 319.

¹ *Colorado*.—*San Juan Hardware Co. v. Carrothers*, 7 Colo. App. 413, 43 Pac. 1053.

Delaware.—*Peninsular Lumber Co. v. Fehrenbach*, 37 Atl. 38, 1 Marv. (Del.) 98.

Georgia.—*Dunning v. Stovall*, 30 Ga. 444.

Illinois.—*Dunphy v. Riddle*, 86 Ill. 22; *Van Felt v. Dunford*, 58 Ill. 145; *Green & Lombard Lumber Co. v. Bain*, 77 Ill. App. 17; *Boylan v. Cameron*, 126 Ill. App. 432.

extend the time,² nor may statutory provisions relating to the time of foreclosure be waived, unless the conduct of the parties is such as will permit of no other conclusion.³ But it has been held that the time limit fixed by the statute within which the action shall be brought does not apply where the money is paid into court to discharge the lien.⁴ Where the mechanic's lien statute fixes no time for bringing the action, the general statute of limitations may be applied.⁵ The limit provided by the statute relating to a lien applies only to persons who are themselves within the act.⁶ If a law be repealed by one which

Indiana.—*School Town of Princeton v. Gebhart*, 61 Ind. 187.

Maine.—*Foss v. Desjardins*, 98 Me. 539, 57 Atl. 881.

Massachusetts.—*Gilson v. Emery*, 77 Mass. 430.

Michigan.—*Hall v. Erskitz*, 125 Mich. 332, 84 N. W. 310, 7 Det. Leg. N. 524.

Nebraska.—*Calkins v. Miller*, 55 Neb. 601, 75 N. W. 1108.

Oregon.—*Willamette Falls Transportation & Milling Co. v. Perrin*, 1 Ore. 182.

Tennessee.—*Ferguson v. Ellis*, 25 Tenn. 268. In time. *Eisendrath Co. v. Gebhardt*, 124 Ill. App. 325, decree affirmed, 222 Ill. 113, 78 N. E. 22; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714, modifying judgment *Garthwait v. Bloomington Hotel Co.*, 130 Ill. App. 418. Duration of lien, see § 131. Failure to claim priority over mortgage, see § 155. Loss of lien by delay in enforcement, see § 157. Time to file claim or statement, see §§ 94-99. Where claim is against decedent's estate, see § 153. See

Dec. & Am. Dig. tit. Mechanics' Liens, § 260.

² No consideration of equity, no suggestion that it would be better for all parties that the suit should be postponed, no parol agreement, and no covenant, however formal, short of a mortgage, amounting of itself to a new lien, can save it. *Hilliard v. Allen*, 4 Cush. (Mass.) 532.

³ *Eisendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22. Where a contract for a mechanic's lien reads, "I hereby agree that you shall have a lien until the same is paid." and provides for payment at a date within the statutory period of limitations, the contract cannot be construed as a waiver of the statute of limitations as to the right to enforce such lien. *Gates v. Baflou*, 56 Iowa 741, 10 N. W. 258.

⁴ *Perini v. Schmyg*, 24 Misc. (N. Y.) 761, 53 N. Y. Supp. 946.

⁵ *Dunning v. Stovall*, 30 Ga. 444.

⁶ The limitation clause of the Illinois mechanic's lien statute

is very much similar it will be construed in connection with the earlier act and a provision merely enlarging the time will apply to one who had entered upon his work at the passage of the new law.⁷ In determining whether the action is barred the usual rule is to exclude either the first day or the last day within which the action might be brought.⁸ Some courts apply a different rule and count both days; generally, however, the rule is applied which is most favorable to the mechanic.⁹

§ 214. When action may be brought.—Of course the action can never be brought until the debt has matured. This is true even though it may be filed and become a charge on the property before such time.¹ And likewise, the contract should be essentially complied with.² Where the entire debt is not due, as where it matures in installments, courts generally permit the action to be brought when one installment is due, taking care of future installments as they become due.³ An action brought before the time fixed by statute for the bringing of the same is premature and will on motion be dismissed.⁴ But this will not prevent its being refiled when the proper time

has no application as between the contractor or material man and the owner. *Moore v. Parrish*, 50 Ill. App. 233.

⁷ *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5; *Bear Lake, &c., Irrigation Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. 7.

⁸ *Haden v. Buddensick*, 49 How. Pr. (N. Y.) 241. Computation of period, see § 62.

⁹ *Phoenix Planing Mill Co. v. Harrison*, 108 Mo. App. 603, 84 S. W. 174. See § 233.

¹ *Arkansas—Hicks v. Branton*, 21 Ark. 186.

Florida.—*Pitt v. Acosta*, 18 Fla. 270.

Maryland.—*Thomas v. Turner*, 16 Md. 105.

Massachusetts.—*Weeks v. Walcott*, 15 Gray (Mass.) 54.

New York.—*Preusser v. Florence*, 4 Abb. N. Cas. (N. Y.) 136. See Dec. & Am. Dig. tit. Mechanics' Liens, § 260.

² *Kihney v. Hudnut*, 3 Ill. 472; *Luter v. Cobb*, 41 Tenn. 525.

³ *Ringle v. Wallis Iron Works*, 85 Hun (N. Y.) 279, 32 N. Y. Supp. 1011; *Iaeger v. Bossieux*, 15 Gratt (Va.) 83, 76 Am. Dec. 189.

⁴ *Knickerbocker Ice Co. v. Kirkpatrick*, 51 Ill. App. 60.

arrives.⁵ No general rule can be given for the particular time at which an action may be brought, and from which date it will be barred if it is not brought. Under some statutes it is held that it is at the time the materials are furnished.⁶ Should the parties go to trial on the merits of the lien, and the defendant file a counter claim for damages, but make no objection on the ground that the action is not brought within the time allowed, he will be estopped from thereafter raising the question that it was not filed within the time limit.⁷

§ 215. **Remedy by action under the Ohio statute.**—Section 3206 of Ohio statutes is as follows: Any person holding a mechanic's lien may, in addition to the remedies herein provided for, proceed by petition, as in other cases of liens, against the owner and all other persons interested, either as lien-holders or otherwise, in any such boat, vessel or other water craft, or house, mill, manufactory, or other building, or appurtenance, mentioned in section thirty-one hundred and eighty-four, and the lot of land on which the same may stand, or to which it may be removed, and obtain such judgment therein for the rent or sale thereof as justice and equity may require.¹

1. *Kinds of Actions.*

The above section, together with section 3200,² provide a number of remedies which a lien-holder or claimant may have. He may proceed by suit on his account, independent of the lien; or he may proceed on his lien exclusively in a court of chancery, or he may unite his two causes of action and obtain a personal judgment and order of sale, and then

⁵ *Millsap v. Ball*, 30 Neb. 728, 46 N. W. 1125.

⁶ *Close v. Hunt*, 8 Blackf. (Ind.) 254. See § 218.

⁷ *Fulkerson v. Kilgore*, 10 Okla. 655, 64 Pac. 5.

¹ 49 Ohio Laws, p. 108, § 1; Act March 22, 1881; 78 Ohio Laws, p. 78; Rev. Stat. 1880 (S. & C.), § 837.

² See § 291.

proceed to foreclose his lien.³ The action is commenced by the filing of a petition. This needs to be done within the period limited by law, and must show performance of the necessary statutory conditions. Where the suit is in the nature of an assertion of a personal claim it is triable by a jury,⁴ but where equitable rights are to be worked out, chancery courts will have jurisdiction.⁵ A cause of action as at law on an account, may be joined with a chancery action to enforce the lien. On the law issues there must be a trial by jury.⁶ The action must be brought in the county where the subject of the action is situated.⁷ And must be brought within the time limit.⁸ All persons having claims in the fund or on the property are proper parties.⁹ But a person having no interest in the result of the litigation is not a proper party. It seems though that a head contractor should be made a party, although he has assigned his interest.¹⁰ As a matter of course if the property has gone into the hands of a receiver the receiver should be made a party.¹¹

2. *Averments of Petition.*

The petition must aver that the work was done under contract,¹² and that it is brought within the time limit,¹³ and where a subcontractor brings a suit it must show that the materials

³ Chapman v. Bolton Steel Co., 4 Ohio C. C. 242, 2 Ohio Cir. Dec. 523.

⁴ Ziegler v. Leibolt, 1 Ohio Dec. (Re.) 404, 8 West. L. J. J. 569.

⁵ Dakin v. Lecklider, 10 Ohio Cir. Dec. 308, 19 Ohio C. C. 254.

⁶ Olppenger v. Ross, 2 Ohio Dec. (Re.) 562, 3 West. L. Mo. 645.

⁷ Chapman v. Bolton Steel Co., 2 Ohio Cir. Dec. 523, 4 Ohio C. C. 242. See § 212.

⁸ Scioto Val. R. Co. v. Cronin, 38 Ohio St. 122.

⁹ Ashley v. Conant Bros. Furniture Co., 5 Ohio Cir. Dec. 486, 12 Ohio C. C. 537. See § 227.

¹⁰ Kloeppinger v. Grasser, 25 Ohio C. C. 90.

¹¹ Andrews, &c., Iron Co. v. Smead Heating, &c., Co., 5 Ohio Dec. 292, 7 Ohio N. P. 439.

¹² Spinning v. Blackburn, 13 Ohio St. 131; United States Mortg., etc., Co. v. Wood, 10 Ohio Cir. Dec. 324, 19 Ohio C. C. 358. See § 236.

¹³ Kunkle v. Reeser, 5 Ohio Dec. 422, 5 Ohio N. P. 401. See § 214.

were furnished for a particular building.¹⁴ The subcontractor must aver that his claim was filed, and not disputed, and that all the conditions precedent were performed,¹⁵ and that the materials or work were done under contract with the owner.¹⁶ All the particulars required in the statute as conditions to the existence of the lien must be set out.¹⁷ It is not necessary that a principal contractor in his petition should show the amount due, under the original contract at the time his claim was payable, since the owner has knowledge of this fact.¹⁸ Irrelevant matter need not be stated.¹⁹

3. *Defenses.*

Whatever defenses the parties may have may be set up in the answer. The statute specifically makes it the duty of the principal contractor to defend actions brought by his subcontractors against owners, and if the principal contractor does not defend and the owner defends he may deduct the expense of such suit from the claim of the contractor, and if he has paid the contractor in full, he may recover the same by suit against him.²⁰ Matters not connected with the transaction can not be urged as a defense.²¹ The owner can not relieve himself of payment of interest unless he pays the money into court.²²

4. *Trial.*

Where the action is for money had and received it must be tried to a jury.²³ And even where legal and equitable actions

¹⁴*Teachout v. Cleveland*, 4 Ohio Dec. (Re.) 376, 2 Clev. L. 57.

¹⁵*Watkins v. Shaw*, 4 Ohio Cir. Dec. 660, 7 Ohio C. C. 415.

¹⁶*Chapman v. Bolton Steel Co.*, 2 Ohio Cir. Dec. 523, 4 Ohio C. C. 242.

¹⁷*Chapman v. Rannells*, 2 Ohio Dec. (Re.) 245, 2 West. L. Mo. 142.

¹⁸*Watkins v. Shaw*, 4 Ohio Cir. Dec. 660, 7 Ohio C. C. 415.

¹⁹*Toledo Lumber Mfg. Co. v. Gross*, 1 Ohio Dec. 83, 3 Ohio N. P. 322.

²⁰See § 206.

²¹*Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737.

²²*Hayden Saddlery Hardware Co. v. Slade*, 2 Ohio Cir. Dec. 38, 3 Ohio C. C. 67.

²³*Dunn v. Kanmacher*, 26 Ohio St. 497. See § 265.

are joined the legal action must be tried by a jury.²⁴ So, where the action is brought upon an account and the issue is taken upon the amount due and as to whether the lien was filed in time, these matters must be tried to a jury.²⁵ Where a material man furnishes material suitable for the work to a person who is erecting the building, it will be presumed that the material was furnished for that building.²⁶ It will also be presumed that material men and laborers have knowledge of the original contract.²⁷ The mere fact that the claim contains certain statements is not prima facie evidence of the correctness of those statements.²⁸ The giving of the note is not a presumption of payment.²⁹ A party in possession, for whom work was done, cannot set up as a defense that he had no interest.³⁰

5. *Form of Petition by Contractor Against Owner for Personal Judgment and Foreclosure.*

Court of Common Pleas, ——— County, Ohio.

A. B., Plaintiff,

Against

Petition.

C. D., E. F. and G. H., Defendants.

1. For his first cause of action, plaintiff says:

There is due to him from the defendant, C. D., on the account hereto attached, marked exhibit A., and made a part

²⁴Clippenger v. Ross, 2 Ohio Dec. (Re.) 562, 3 West. L. Mo. 645. Ohio Cir. Dec. 176, 11 Ohio C. C. 339.

²⁵Ashley v. Conant Bros. Furniture Co., 5 Ohio Cir. Dec. 486, 12 Ohio C. C. 537.

²⁶Kunkle v. Reeser, 5 Ohio Dec. 422, 5 Ohio N. P. 401. See § 256.

²⁷Gimbert v. Madden, 3 Ohio Dec. 497, 2 Ohio N. P. 346, reversed, Gimbert v. Heinsath, 5

²⁸Bénder v. Stettinius, 10 Ohio Dec. (Re.) 186, 19 Wkly. L. Bull. 163. See § 256.

²⁹Rousculp v. Ohio Southern R. Co., 10 Ohio Cir. Dec. 621, 19 Ohio C. C. 436. See § 261.

³⁰Williams v. Webb, 13 Ohio Dec. (Re.) 264, 2 Disney (Ohio) 430.

hereof the sum of _____ dollars and _____ cents, which he claims with interest from the _____ day of _____, A. D. 19—.

2. For his second cause of action, plaintiff further says:

That the items charged in the said account against said defendant, C. D., described in his first cause of action, the averments in regard to which are hereby referred to, and made a part thereof, were as stated therein, for work and materials, etc., furnished in and about the construction (alteration or repair, etc.) of a house (mill, etc.) at the request of the said C. D., between the _____ day of _____, A. D. 19—, when the same commenced, and the _____ day of _____, A. D. 19—, when the same ended, on a certain lot of land of the said C. D. bounded and described as follows, to-wit.: (Here follow with description.)

Plaintiff says that within four months from the completion of said work, etc., on the _____ day of _____, A. D. 19—, he duly filed with the recorder of said County of _____, State of Ohio, for record, an affidavit containing an itemized statement of the amount and value of such labor, etc., with all credits and set-offs thereon, with a statement of the amounts and time when the same should have been paid, and a description of said lot of land on which said house, etc., stands, in pursuance of the statute in such case made and provided, and which was recorded in mechanic's lien book, vol. —, page —, of the records of said county, whereby his said claim became and is a valid and subsisting lien on said building and lot of land from the said _____ day of _____, A. D. 19—, when said labor etc., was commenced, for the full amount thereof, no part of which has been paid or satisfied.

Plaintiff further says that E. F. and G. H. each claim to hold some interest in said property, as lien-holders or otherwise, which plaintiff prays they may be required to set up

therein. Wherefore, plaintiff prays judgment in his said account for \$——, with interest as aforesaid, that the same may be declared to be a valid and subsisting lien on said premises by virtue of said proceedings; that the liens thereon may be marshalled; that said premises may be sold and plaintiff's said claim and judgment, so to be rendered, may be satisfied from the proceeds thereof and that he may have such other and further relief as justice and the nature of his case may require.

———, Attorney for Plaintiff

The State of Ohio, ——— County, ss:

A. B., being duly sworn, says he believes the statements and allegations of his foregoing petition to be true.

Sworn to and subscribed before me and in my presence, this
..... day of, A. D. 19...

..... Notary Public.

Court of Common Pleas, ... County, Ohio.

A. B., Plaintiff,

Against

Praecept.

C. D., and others, Defendants.

To the Clerk: Issue summons on the petition in the above entitled action, to the sheriff of County, for the defendants, C. D., E. F. and G. H., returnable according to law. Indorse amount claimed: \$., with interest from the . . . day of A. D. 19., foreclosure of lien, and equitable relief. Attorney for Plaintiff.

Service may be made by publication, as in other cases, Sec. 3191.

6. *Form of Petition When Parties Act Under Contract.*

1. For his first cause of action herein, plaintiff says:

That on the day of, A. D. 19.., he duly entered into a contract in writing with the said defendant, C. D., which is in the words and figures following, to-wit.: (Here copy the contract in full; or, if preferred, the copy may be attached to the petition with proper averment; stating the substance and effect of the contract.)

*Plaintiff has duly performed all the conditions of said contract on his part to be performed, but the said defendant has notwithstanding failed to perform his part thereof in this, to-wit: (Here set out in what his default consists.) Whereby plaintiff has been damaged in the sum of \$....., which he avers is due to him from the said C. D., and which he claims with interest from the day of, A. D. 19...

2. For his second cause of action herein, plaintiff says:

That the items charged in his account against the said C. D. hereto attached, and marked exhibit B, were so furnished and charged in pursuance of said contract set out in his first cause of action, to which reference is here made, and were: (Here follow preceding form from the *.)

7. *Form of Petition for Foreclosure of Lien by Subcontractor Against Owner.*

Court of Common Pleas, ... County, Ohio.

A. G. Plaintiff,

Against

Petition.

C. D., Defendant.

The plaintiff says: That on the day of, A. D. 19.., he, as subcontractor, commenced to furnish materials for the brick work, under and in pursuance of a contract with E. F., principal contractor, in accordance with the terms of his contract with the said C. D., as owner, for the construction of a house on the premises then and now owned by said C. D., situate in the said county of, State of Ohio, and bounded and described as follows, viz.: (Here describe premises.)

On the day of, A. D. 19.., plaintiff had duly performed all the conditions of said contracts to be by him performed, and completed the furnishing of said materials, and then there became due to him therefor the sum of \$....., no part of which has been paid to him (except the sum of \$.....), and there is now due and owing to him thereon, the sum of dollars.

On the day of, A. D., 19.., plaintiff filed with said C. D., a verified and itemized statement and account of the amount and value of said materials, with all credits and set-offs, in pursuance of the statute in such case made and provided (and on the day of, A. D. 19.., filed a copy thereof with the recorder of said county). (Section 3195.) Plaintiff has not been notified that said account was disputed, and the same was not in fact disputed within five days, that there was due to plaintiff on account thereof, the sum of dollars, no part thereof has been paid, although more than five days have since elapsed.

Thereafter, and on the day of, A. D. 19.., the next succeeding payment became due E. F., principal contractor, from C. D., owner, on their said principal contract, yet the said C. D. has not paid to plaintiff, his pro rata share thereof on his said claim.

On the day of, A. D. 19.., plaintiff duly

filed with the recorder of said county, an affidavit and itemized statement of his account containing the amount and value of said materials, will all credits and set-offs thereon, a copy of the contract (or a statement of the amount and times of payment to be made according to the contract), together with a description of said premises in pursuance of the statute in such case made and provided. (Plaintiff caused said C. D., owner, to be notified that such lien was in existence.)

Plaintiff therefore avers that by reason of the facts aforesaid, he has acquired and still holds a valid subsisting mechanic's lien on the said premises for his claim as aforesaid, amounting to \$....., with interest from; no part of which has been paid. (If others are interested in the property as lien-holders or otherwise, add averment to that effect as in preceding forms). Wherefore plaintiff prays that an account be taken of the amount due him; that said lien may be duly declared and made absolute; that said premises may be sold and the proceeds applied in satisfaction of said claim and lien; and that he may have such further and other relief as is just.

.....Attorney for Plaintiff.

(Add affidavit and praecipe.)

8. *Form of Petition in Action for Money had and Received by Subcontractor Against Owner, Where He Has Not Been Paid According to Section 3200 (231a).*

Court of Common Pleas, ... County, Ohio.

A. B., plaintiff,

against

(Petition.)

C. D., defendant.

The plaintiff says: That the defendant, C. D., on or about the day of, A. D. 19.., contracted with one E. F., as principal contractor, for the erection of a certain house on his lot

of land in said county of according to certain plans and specifications then agreed upon by them, for the sum of \$....., in payments as follows, viz.: (Here insert times and amounts of payments.) Afterwards, on or about the day of, A. D. 19.., the said E. F., principal contractor, as aforesaid, contracted with this plaintiff, as subcontractor, to construct the brick wood for said house, under and in accordance with the terms of his said contract with defendant, for the sum of \$....., payable when the work was completed. This plaintiff thereupon, and on the day of, A. D. 19.., duly notified said defendant, as the owner, of his employment as subcontractor, and proceeded to do said brick work. That plaintiff duly performed all the conditions of said contract by him to be performed, and has completed said brick work. On the day of, A. D. 19.., he duly filed with the said defendant, C. D., his affidavit and notice stating the amount and value of his said work as subcontractor, pursuant to the statute in such case made and provided, and demanding that said defendant out of the next subsequent payment due to said principal contractor under said original contract, pay him the amount of his said claim.

Plaintiff has never been notified that his said claim was disputed by said E. F., and the same is admitted by him to be correct, and no part thereof has been paid, and there is now due and owing thereon from the said E. F. to this plaintiff, on account of said work as sub-contractor, the sum of \$....., with interest from the day of, A. D. 19.. The defendant, C. D., still retains in his hands, due to the said E. F., under said contract, the payment due and payable, and the same is more than sufficient to pay plaintiff, and should be applied by said C. D., to his claim in pursuance of the statute in such case made and provided. Yet the defendant still neglects and refuses to pay the same to this plaintiff. There is, therefore, by reason of the premises,

due from the defendant to this plaintiff, \$....., with interest from, for money had and received for the use of plaintiff, for which he prays judgment.

....., Attorney for Plaintiff.

(Add verification and praecipe.)

§ 216. **Remedies under the Indiana statute.**—The provision of the Indiana statute as to the enforcement of the lien is as follows: Any person having such lien may enforce the same, by filing his complaint in the circuit or superior court of the county where the real estate or property on which the lien is so taken is situate at any time within one year from the time when said notice has been received for record by the recorder of the county; or, if a credit be given, from the expiration of the credit, and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void. If said lien be foreclosed as herein provided, the court rendering judgment shall order the sale to be made, and the officers making the sale shall sell the property without relief whatever from valuation or appraisement laws.¹

The provision as to parties and consolidation of actions reads: In such actions, all persons whose liens are recorded as herein provided may be made parties, and issues may be made up, and trials had, as in other cases; and the court may, by judgment, direct a sale of the land and building for the satisfaction of the liens and costs, such sales to be without prejudice to the rights of any prior incumbrancer, owner or other person not parties to the action. If several such actions be brought by different claimants, and be pending at the same time, the court may order them to be consolidated.²

On the question of prorating claims it is provided that if the proceeds of sale be insufficient to pay all the claimants,

¹ Acts 1909, p. 297, § 5. See Burns' R. S. 1908, § 8299.

² Acts 1909, p. 297, § 6. See Burns' R. S. 1908, § 8300.

then the court shall order them to be paid in proportion to the amount due each.³

1. *Who May Bring Action.*

The statute specifically says, that the person who has the lien may bring the action. The remedy of foreclosure is a cumulative one. A personal action may also be brought under the statute giving a right thereto,^{3a} as to any balance due the building contractor when or after notice of the claim against him is served on the land owner.^{3b} In seeking to foreclose a lien, the parties must pursue the method provided by the statute for its enforcement.⁴ Whoever holds the lien claim is the proper person to bring the action.⁵ Persons who have separate liens on the same property should not join in the suit to foreclose; one lienholder should sue, and name the others as defendants, and each of the defendant lienholders should bring a cross-action to foreclose his lien by filing a plea of counter-claim. However, separate suits brought by different lienholders may be consolidated afterwards.⁶ The laborer or material man is not required to employ any other remedy before suing to foreclose his lien. The mere fact that the laborer does not attempt to get his money from a contractor employing him, will not defeat his right to enforce a lien against the property for his claim.⁷

³ Acts 1909, p. 297, § 7, re-enacting Burns' R. S. 1908, § 8301.

^{3a} Acts 1909, p. 297, § 8, re-enacting Burns' 1908, § 8302.

^{3b} O'Halloran v. Leachey, 39 Ind. 150; Crawford v. Crockett, 55 Ind. 220; Clark v. Maxwell, 12 Ind. App. 199, 40 N. E. 274. Exclusiveness of Remedy, see § 198.

⁴ Farmers' Loan, &c., Co. v. Canada, &c., R. Co., 127 Ind. 250, 26 N. E. 794, 11 L. R. A. 740n; Northwestern Loan, etc. Assn. v.

McPherson, 23 Ind. App. 250; 54 N. E. 130; Aetna Life v. Finch, 84 Ind. 301.

⁵ Trueblood v. Shellhouse, 19 Ind. App. 91, 49 N. E. 47. Who may bring action, see § 164.

⁶ Northwestern Loan, &c., Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130; Acts 1909, p. 297, § 6. See Burns R. S. 1908, § 8300.

⁷ Andis v. Davis, 63 Ind. 17. See Beach v. Huntsman, — Ind. App. —, 85 N. E. 523.

2. *Where Brought.*

The statute specifically provides that the action must be brought in the circuit or superior court of the county where the property on which the lien was taken is situated.⁸

3. *When to be Brought.*

The statute is specific in declaring the time within which the action must be brought, and, unless it is brought within the time thus fixed, all proceedings are void.⁹ Ordinarily the time is one year from the time that the notice is received for record by the recorder. If a credit should be given, and the notice of lien shows when it will expire,^{9a} then the year dates from the time of the expiration of the credit, but if the record of the mechanic's lien notice does not show when the debt thereby secured becomes due, the time for beginning foreclosure proceedings will expire one year after the date of filing such notice.¹⁰ Under the statute an action is commenced when the complaint is filed in court and summons is issued thereon.¹¹ The statute has been changed ^{11a} since a decision to the contrary was rendered.^{11b} There is no necessity for a demand to be made before the action is brought.¹² In cases where the statute excuses the filing of the notice, then the time will date from the time when the notice should have been filed were it required to be filed.¹³ This limitation of one year does not apply to actions brought to enforce a personal liability against the owner,¹⁴ based on the fact that he employed

⁸ Acts 1909, p. 297, § 5. See Burns' R. S. 1908, § 8299. See § 212.

⁹Close v. Hunt, 8 Blackf. (Ind.) 254; Kulp v. Chamberlain, 4 Ind. App. 560, 31 N. E. 376. Limitation of action, see § 213.

^{9a} Acts 1907, p. 334, §§ 3, 4.

¹⁰Schneider v. Kolthoff, 59 Ind. 568. Acts 1907, p. 334, §§ 3, 4.

¹¹Burns' R. S. 1908, § 317.

^{11a} Acts 1909, p. 334, § 3.

^{11b}Carriger v. Mackey, 15 Ind. App. 392; 44 N. E. 266.

¹²Duckwall v. Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

¹³Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88.

¹⁴Bourgette v. Hubinger, 30 Ind. 296; Clark v. Maxwell, 12 Ind. App. 199; 40 N. E. 274; Chicago, etc. R. Co. v. Woodard, 159 Ind. 541; 65 N. E. 577; Crawfordsville v. Barr, 65 Ind. 367.

the laborer or bought the materials, or gave his promissory note for the amount due. But where a personal liability for the contractor's bills is relied on by reason of notice of a claim before full payment the laborer or material man has only "the same rights and remedies" as the holders of mechanics' liens.^{14a}

4. *Complaint or Petition.*

The action is commenced by the filing of the complaint, and issuing summons thereon,^{14b} and this complaint must contain all the necessary averments to show the right of the claimant to the lien. It must show that the materials were furnished for, and used in the building, sought to be charged,¹⁵ that the person to whom the materials were furnished had authority to erect the building,¹⁶ and generally facts sufficient to show a contract for doing the work, and that the work was done as provided for in the contract.¹⁷ The complaint should also show the amount claimed to be due.¹⁸ And it must show who owned the real estate, sought to be affected at the time the lien attached.¹⁹ As the notice of intention to claim is the basis of the lien, the petition must show that such notice was filed and recorded within the time fixed by law.²⁰ And it is also held necessary to

^{14a} Acts 1909, p. 297, § 8, re-enacting Burns' R. S. 1908. See § 302.

^{14b} Burns' 1908, § 317. Acts 1909, p. 334, §§ 3, 4.

¹⁵ *Crawfordsville v. Barr*, 45 Ind. 258; *Hill v. Braden*, 54 Ind. 72; *Hill v. Ryan*, 54 Ind. 118; *Crawford v. Crockett*, 55 Ind. 220; *Talbot v. Goddard*, 55 Ind. 496; *Crawfordsville v. Brundage*, 57 Ind. 262; *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070; *Manor v. Heffner*, 15 Ind. App. 299, 43 N. E. 1011; *Potter M. Co. v. A. B. Meyer & Co.*, — Ind. —; 86 N. E. 837.

See § 233.

¹⁶ *Ogg v. Tate*, 52 Ind. 159.

¹⁷ *Stephenson v. Ballard*, 50 Ind. 176; *Adams v. Buhler*, 116 Ind. 100, 18 N. E. 269. Contract with owner, see § 240.

¹⁸ *Crawfordsville v. Irwin*, 46 Ind. 438.

¹⁹ *Adams v. Buhler*, 116 Ind. 100, 18 N. E. 269.

²⁰ *Sharpe v. Clifford*, 44 Ind. 346; *Crawfordsville v. Barr*, 45 Ind. 258; *Crawfordsville v. Irwin*, 46 Ind. 438; *Crawfordsville v. Brundage*, 57 Ind. 262; *Crawfordsville v. Boots*, 76 Ind. 32;

file an original or copy of said notice with the complaint.²¹ A proper description of the property upon which it is sought to enforce the lien must be set out in the complaint.²² If the complaint shows that any part of the materials was furnished, or that any portion of the work was performed within the time limit the lien is filed in time, and the complaint will be good on demurrer.^{22a} A party seeking to enforce a mechanic's lien must bring himself clearly within the terms of the statute by the allegations of his complaint, but when he does so the statute will be liberally interpreted toward accomplishing the purposes of its enactment.^{22b} But a complaint alleging sufficient facts to entitle the plaintiff to recover is not rendered bad on demurrer by reason of additional allegations which constitute mere surplusage.^{22c}

5. *Parties.*

The ordinary rules as to parties plaintiff and defendant, will apply. If lien holders are not made parties they are not affected by the suit,²³ and after the year allowed for bringing such suit has expired the lien will be void as to any other lienholders not joined as parties.^{23a} Parties having separate claims cannot join in the complaint, but their actions may be consolidated by order of the court.²⁴ The owner of an equity of redemption in the property is a necessary

Hubbard v. Moore, 132 Ind. 178, 31 N. E. 534.

²¹ Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333; Davis v. McMillan, 13 Ind. App. 424, 41 N. E. 851.

²² Crawfordsville v. Barr, 65 Ind. 367.

^{22a} Conlee v. Clark, 14 Ind. App. 205, 14 N. E. 762; Jeffersonville, etc., Co. v. Riter, 138 Ind. 170, 37 N. E. 652.

^{22b} Potter M. Co. v. A. B. Meyer & Co., — Ind. —, 86 N. E. 837.

^{22c} Ochs v. M. J. Carnahan Co., — Ind. App. —, 76 N. E. 788.

²³ Deming-Colburn Lumber Co. v. Union Nat. Sav., &c., Assn., 151 Ind. 463, 51 N. E. 936; Stoermer v. Peoples' Sav. Bank, 152 Ind. 104, 52 N. E. 606; Union Nat. Sav., &c., Assn. v. Helberg, 152 Ind. 139, 51 N. E. 916; Martin v. Berry, 159 Ind. 566, 64 N. E. 912.

^{23a} Union Nat. etc. Assn. v. Helberg, 152 Ind. 139; 51 N. E. 916.

²⁴ Northwestern Loan, &c., Assn. v. McPherson, 23 Ind. App. 250, 54 N. E. 130.

party.²⁵ But when the person has conveyed away the property, and has no longer an interest therein, the grantee should be made a party.²⁶ If a subsequent purchaser is made a party, he must set up his claim or be barred.²⁷ The husband of a wife is a proper party defendant.²⁸ So the head contractor is a proper, although not always a necessary party.²⁹ If the owner has assumed the payment of the lien, then the head contractor is not a necessary party.³⁰

6. Trial.

Actions to enforce mechanics' liens are not triable by jury.³¹ Questions as to the issues and the evidence to establish same do not materially differ from other similar cases.³²

7. Judgment, Etc.

Judgment is rendered as in ordinary cases, and an order of sale made to sell the land and the building, and the land is sold as provided by law. If mortgage lienholders are not made parties to the action, such lienholders may enjoin the sale of property.³³ If the property is sold under an order of foreclosure the purchaser has a right of redemption against a mortgage lienholder not made a party,³⁴ as successor to the title of the original owner. Where several buildings are erected under one contract, a decree for a lien

²⁵ Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811. See §§ 221-228.

²⁶ Marvin v. Taylor, 27 Ind. 73; Kellenberger v. Boyer, 37 Ind. 188.

²⁷ Woolen v. Wishmier, 70 Ind. 108.

²⁸ Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333; Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811.

²⁹ Hubbard v. Moore, 132 Ind. 178, 31 N. E. 534.

³⁰ Leeper v. Myers, 10 Ind. App. 314, 37 N. E. 1070.

³¹ Albrecht v. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

³² Miller v. Fosdick, 26 Ind. App. 293, 59 N. E. 488. Trial, see § 265.

³³ Martin v. Berry, 159 Ind. 566, 64 N. E. 912. Findings, see § 271.

³⁴ Union Nat. Sav. Assn. v. Helberg, 152 Ind. 139, 51 N. E. 916.

upon each building for a specific amount will be justified.³⁵ If the judgment specifies the amount due and directs sale of the property for the payment thereof, it will be sufficient.³⁶ If the owner has only a leasehold interest, or the land is incumbered by mortgage, the lien will extend to a new building, in the construction of which plaintiff's labor or materials were used, separate and apart from the land, and it may be sold to satisfy the lien.³⁷ A general verdict or finding of the truth of the complaint entitles plaintiff to a decree enforcing sale of property.³⁸

8. *Distribution of Proceeds.*

The proceeds of sale should be distributed according to the priority of the various claimants.³⁹ The sale of the property divests the property of the lien, for the lien itself is transferred to the fund derived from such sale.⁴⁰ The provision relating to attorney fees is constitutional, and they may be allowed as the statute provides,⁴¹ even though notes have been given for the amount secured by the lien which do not provide for attorney fees.^{41a} If there is nothing due the plaintiff, there can be no allowance for attorney fees.⁴² Costs are also proper to be considered in distribution of proceeds.⁴³

§ 217. Remedies under Indiana statute—Forms of complaints.—The following forms are adapted to the different relations indicated:

³⁵ *Manor v. Heffner*, 15 Ind. App. 299, 43 N. E. 1011.

³⁶ *Deeming v. Patterson*, 10 Ind. 251.

³⁷ See § 45, 45a.

³⁸ *Nordyke-Marmon Co. v. Dickson*, 76 Ind. 188.

³⁹ *Thorpe Block Sav., &c., Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978. Proceeds of sale, see § 293.

⁴⁰ *Totten, &c., Foundry Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703.

⁴¹ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

^{41a} *Beach v. Huntsman*, — Ind. App. —, 85 N. E. 523.

⁴² *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129.

⁴³ *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333.

See § 302.

1. *Form of Petition or Complaint by Principal Contractor.*

(Title and beginning.)

That on the day of, 19.., said defendant was the owner of the following described real estate in the city of Indianapolis, county of Marion, state of Indiana: (Here describe it); that said defendant ever since has been, and still is, the owner of said real estate.

This plaintiff avers that on said day plaintiff and defendant entered into a certain written contract and agreement of said date by which this plaintiff promised and agreed to furnish the material in and for the construction of a certain dwelling house upon said above described real estate for said defendant, and in consideration of which said defendant promised and agreed to pay this plaintiff therefor the sum of dollars; which said agreement is in the words and figures as follows: (Here copy agreement.)

Plaintiff avers that pursuant to said agreement this plaintiff did furnish the material, and did perform all the labor and services in the construction and erection of said dwelling house on said real estate; the items and bill of particulars of said material and services are as follows, to-wit.: (Here copy items); that said material was furnished for, and used, and the labor and services performed, in the construction of said dwelling.

This plaintiff further avers that on the day of, 19.., and within sixty days from the time of furnishing said materials and performing said labor and services this plaintiff filed in the recorder's office of the county of Marion, State of Indiana, a notice in writing of his intention to hold a lien on said above described real estate and the said building thereon; and therein specifically set forth the amount claimed, to wit.: dollars, together with a description

of said above described real estate; a copy of which said notice is filed herewith, made a part of this complaint and marked exhibit A.

That said notice was, on the day of, 19.., by said recorder duly recorded in the recorder's office of said county in miscellaneous book No., page; that said sum of dollars is now due and unpaid.

That a reasonable fee for plaintiff's attorney and for his services in this action is dollars.

Plaintiff further avers that said defendants D. E. and E. F. and F. G. claim to have some interest and to hold liens upon said above described real estate, and they are made parties hereto to answer to their interests therein.

Wherefore plaintiff sues and asks for judgment in the sum of dollars and the foreclosure of his said lien and an order for the sale of said property and for all other proper relief.

(Signed.)

2. *Form of Petition or Complaint of Subcontractor.*

(Title and beginning.)

That on the day of, 19.., said defendant was the owner of the following described real estate in the city of Indianapolis, county of Marion, state of Indiana: (Here describe it); that said defendant ever since has been, and still is, the owner of said real estate.

This plaintiff avers that on said day said defendant and one R. S. entered into a certain contract and agreement in writing, whereby the said R. S. undertook and agreed to furnish all materials and perform the labor in the construction of a dwelling house for said defendant on said above described real estate in consideration of the payment of a certain sum by said defendant; that in pursuance of said contract and in the execution thereof and in the construction and erection of said dwelling house the said R. S. purchased of this plaintiff the following materials, to-wit.: (Here set out items of

materials), and that this plaintiff performed work and labor for said R. S. as follows: (Here set out items of labor.)

That said materials were furnished and said work performed in the construction and erection of said dwelling house and are of the value of dollars.

This plaintiff further avers that on the day of, 19.., and within sixty days from the time of furnishing said materials and performing said labor and services this plaintiff filed in the recorder's office of the county of Marion, state of Indiana, a notice in writing of his intention to hold a lien on said above described real estate and the said building thereon; and therein specifically set forth the amount claimed, to-wit.: dollars, together with a description of said above described real estate; a copy of which said notice is filed herewith, made a part of this complaint and marked exhibit A.

That said notice was, on the day of, 19.., by said recorder duly recorded in the recorder's office of said county in miscellaneous book No., page; that said sum of dollars is now due and unpaid.

That a reasonable fee for plaintiff's attorney and for his services in this action is dollars.

Plaintiff further avers that said defendants, D. E. and E. F. and F. G., claim to have some interest and to hold liens upon said above described real estate, and they are made parties hereto to answer to their interests therein.

Wherefore plaintiff sues and asks for judgment in the sum of dollars and the foreclosure of his said lien and an order for the sale of said property and for all other proper relief.
(Signed.)

3. *Form of Petition or Complaint of Material Man.*

(Title and beginning.)

That on the day of, 19.., and divers days and times thereafter this plaintiff sold, furnished and de-

livered to said defendant, at defendant's special instance and request, certain materials (or performed certain labor), to-wit.: Lumber, lath, shingles, door frames, window frames, doors and sash, of the value of dollars, a bill of window frames, doors and sash, of the value of dollars, a bill of particulars of all of which is as follows, to-wit.: (Here copy bill of particulars.)

That all of said materials were sold by plaintiff for the purpose of being used in and were used in the construction and erection of a certain building and dwelling house built and erected by said defendant on the following described real estate in the city of Indianapolis, said county of Marion, state of Indiana, to-wit.: (Here describe it.)

This plaintiff further avers that on the day of, 19.., and within sixty days from the time of furnishing said materials and performing said labor and services this plaintiff filed in the recorder's office of the county of Marion, state of Indiana, a notice in writing of his intention to hold a lien on said above described real estate and the said building thereon; and therein specifically set forth the amount claimed, to-wit.: dollars, together with a description of said above described real estate; a copy of which said notice is filed herewith, made a part of this complaint and marked exhibit A.

That said notice was, on the day of, 19.., by said recorder duly recorded in the recorder's office of said county in miscellaneous book No., page; that said sum of dollars is now due and unpaid.

That a reasonable fee for plaintiff's attorney and for his services in this action is dollars.

Plaintiff further avers that said defendants, D. E. and E. F. and F. G., claim to have some interest and to hold liens upon said above described real estate, and they are made parties hereto to answer to their interests therein.

Wherefore plaintiff sues and asks for judgment in the sum

of dollars and the foreclosure of his said lien and an order for the sale of said property and for all other proper relief.
(Signed.)

§ 218. Various matters determining limitation of right to sue.—These periods of limitation of the right to sue are made for the protection of the owner, that his property may not have a lien unduly prolonged thereon, and the courts require a strict compliance with the statute,¹ and hold the lien barred if the action is not brought within the required time.² If an action is brought by one lien holder and another comes in, the rule generally applied is that he will be in time if his answer is filed within the time in which he could have brought the original action.³ Some courts have held that the fact that the lien holder has brought an action or the property is in court, will not excuse other lien holders from filing their suit or answers within the required time.⁴ But if the lien holder was made a party, this rule would probably not be applied if he set up his claim within the time allowed to plead the same in ordinary actions. But when the period is fixed from the filing of the lien, this term is held to mean from the time the lien should have been filed.⁵ Some statutes make the time at which the action should be brought depend on the date of the maturity of the claim or the accrual of the indebtedness and in such cases the date of the last item of the account, in the absence of a fixed time for payment,⁶ will be regard-

¹ McIntosh v. Schroeder, 154 Ill. 520, 39 N. E. 478; Lee v. Chambers, 13 Mo. 238; Pardue v. Missouri Pac. R. Co., 52 Neb. 201, 71 N. W. 1022, 66 Am. St. 489; Service v. McMahon, 42 Wash. 452, 85 Pac. 33.

² A personal judgment might be had on the debt however. Monroe v. Hanson, 47 Neb. 30, 66 N. W. 12.

³ Title Guarantee & Trust Co. v. Wrenn, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454.

⁴ Bradford v. Dorsey, 63 Cal. 122.

⁵ Squier v. Parks, 56 Iowa 407, 9 N. W. 324; Gilcrest v. Gottschalk, 39 Iowa 311.

⁶ Doyle v. Wagner, 100 Minn. 380, 111 N. W. 275. The giving of a note due one day after date,

ed as the maturity of the debt,⁷ and the action must be brought within the required period, dating from that time.⁸ Where credit is given, the debt will mature from the time the credit expires.⁹ However if neither the contract nor the notice states that credit is given, it will be assumed, especially as to third parties, that there is no credit.¹⁰ Of course, if the contract fixes the time of payment that will control,¹¹ and the period will date from that time.¹² In the absence of a special provision, a subcontractor will be within the time limit if he brings the action within the same time that the principal contractor might have done so.¹³

§ 219. Various matters determining limitation of right to sue, continued.—Some statutes fix the time for the beginning of the period within which an action must be brought as the cessation of the work. This term is generally used synonymously with completion of the work.¹ But if the contractor or subcontractor is discharged before completing his contract the

does not extend the time. *Jones v. Alexander*, 10 Sm. & S. (Miss.) 627.

⁷ *Garrison v. Hawkins Lumber Co.*, 111 Ala. 308, 20 So. 427. Maturity of claim for filing statement, see § 94. Necessity that claim be mentioned, see § 102.

⁸ A contractor's lien is lost unless the land is attached within ninety days from the pay day. *Johnson v. Pike*, 35 Me. 291.

⁹ *Hill v. Stagg*, 1 Wils. (Ind.) 403; *Mix v. Ely*, 2 G. Greene (Iowa) 513. Maturity of note. *Bonsall v. Taylor*, 5 Iowa 546.

¹⁰ *Schneider v. Kolthoff*, 59 Ind. 568.

¹¹ *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5.

¹² From last installment due.

McClellan v. Smith, 11 Cush. (Mass.) 238. Where the contract provides that if there be a difficulty between the parties it shall be submitted to arbitration, the date of the arbitrator's award, will be the time the debt is due, etc. *Kirby v. Tead*, 13 Metc. (Mass.) 149. Where the contract stated that a note due in six months should be given when job was completed, the time dated from the maturity of this note. Even if this note were not given, still it would date from the time it would have been due if it had been given. *Wheeler v. Schroeder*, 4 R. I. 383.

¹³ *Meeks v. Sims*, 84 Ill. 422.

¹ Completion of work, see §§ 49, 210.

time of his discharge will be the cessation of the work, and fix the date from which the period will run for the commencement of his action.³ By completion of the work is usually meant the completion of the whole of the building or whatever part thereof the party is required to perform under his contract.⁴ If the payment is due on completion of the contract and the parties extend the time of the completion, this will of course, extend the time within which the action may be brought.⁵ Difficulty is experienced in fixing the date when the period should begin to run where the materials are furnished at different times, and under what are known as continuing contracts.⁶ Generally in such cases the date of the last work is the time the last item of material was furnished,⁷ even though the contract provides that payments shall be made on the first of each month or in installments.⁸ If the statute fixes the delivery of the materials as the date from

³ *Huntington v. Barton*, 64 Ill. 502; *Freeto v. Houghton*, 58 N. H. 100.

⁴ *United States—South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561, 18 L. ed. 894.

California—Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. 681. See § 95.

Indiana—Hamilton v. Naylor, 72 Ind. 171.

Kentucky—Longest v. Breden, 9 Dana (Ky.) 141.

Pennsylvania—Hern v. Hopkins, 13 Serg. & R. (Pa.) 269.

Vermont—Piper v. Hoyt, 61 Vt. 539, 17 Atl. 798.

Manitoba—McLennan v. Winnipeg, 3 Manitoba 474. Proof must clearly show it is within time. *Kay v. Smith*, 10 Helsk. (Tenn.) 41.

⁵ *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5.

⁶ See § 98.

⁷ *Indiana—McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470n.

Iowa—Merchand v. Cook, 4 G. Greene (Iowa) 115.

New Hampshire—Hill v. Callahan, 58 N. H. 497.

Tennessee—Luter v. Cobb, 1 Cold. (Tenn.) 525.

Wisconsin—Fowler v. Bailley, 14 Wis. 125. Where there has been a continuous delivery of materials, which are put into a structure, the statute of limitations begins to run against the lien therefor on the structure, from the delivery of the last lot of materials. *O'Leary v. Burns*, 53 Miss. 171.

⁸ *Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899; *Capital Lumbering Co. v. Ryan*, 34 Ore. 73, 54 Pac. 1093.

which the limitation begins to run a petition will be in time if filed within the time limit after the delivery of the last article of materials.⁹

§ 220. **When suit is regarded as brought.**—As a general rule a suit is commenced when the summons for defendant is issued,¹ though the summons is not served until afterwards.² But no one is bound unless summons is issued and service made.³ The failure to serve can only be taken advantage of by persons not served.⁴ Under some statutes the action is re-

⁹ *Pike v. Scott*, 60 N. H. 469; *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323.

¹ *California*.—*Van Winkle v. Stow*, 23 Cal. 457; *Flandreau v. White*, 18 Cal. 639; *Green v. Jackson Water Co.*, 10 Cal. 374.

New Jersey.—*Bennet v. Trenton Locomotive & Mach. Mfg. Co.*, 32 N. J. L. 513, 31 N. J. L. 246.

New York.—*Gee v. Torrey*, 77 Hun (N. Y.) 23, 28 N. Y. Supp. 239; *Hammond v. Shepard*, 50 Hun (N. Y.) 318, 3 N. Y. Supp. 349. A purely statutory lien must conform exactly to the statutory conditions; but when it once attaches, and is put in process of foreclosure, the proceedings, while in part definitely fixed, are nevertheless in important particulars left to the general course of practice. No construction should be strained at in order to defeat them, but the rights of all parties should be harmonized and respected as far as is reasonably practicable. *Sheridan v. Cameron*, 65 Mich. 680, 32 N. W. 894. See *Dec. & Am. Dig. tit. Mechanics' Liens* § 290.

² *Western Sash & Door Co. v. Helman*, 65 Kan. 5, 68 Pac. 1080; *Spofford v. Huse*, 9 Allen (Mass.) 575.

Defective service.—The service of summons on a claim under the mechanic's lien law was defective. A new summons was issued more than a year after the furnishing of the labor and materials. The service of the new summons was valid and effectual, and the claim good. *Mutual Ben. Life Ins. Co. v. Rowand*, 11 C. E. Green (N. J. Eq.) 389.

³ H. furnished a lot for S. to build on, agreeing to convey to whomsoever S. might sell. The house being built, H. conveyed to V., taking, for part of the price, a mortgage which he assigned to O. Held that neither V.'s grantee nor O. were so united in interest with H. that service on him commenced as to them an action to foreclose a material man's lien. *Rice v. Simpson*, 30 Kan. 28, 1 Pac. 311.

⁴ *Casserly v. Waite*, 124 Mich. 157, 82 N. W. 841, 83 Am. St. 320.

garded as brought when the petition is filed within the time limit,⁵ provided by law.⁶ The courts of New York have held that the rights of all defendants are saved if the plaintiff commences his action in time.⁸ In other states, however, cross-petitioners are held to be barred where they do not file their answers within the limited time in which they should have filed their petitions.⁹ If a defective action is brought and thereafter within the time limit it is amended the action will be safe,¹⁰ for if the amended action is brought within

⁵ **Indiana.**—*Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

Michigan.—*Casserly v. Waite*, 124 Mich. 157, 82 N. W. 841, 83 Am. St. 320; *Hannah, &c., Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120; *Gosline v. Thompson*, 61 Mo. 471.

Mississippi.—*Christian v. O'Neil*, 46 Miss. 669.

New York.—*Wright v. Roberts*, 55 Hun (N. Y.) 610, 8 N. Y. Supp. 745.

South Carolina. — *Oliver v. Fowler*, 22 S. Car. 534.

⁶ The powers of amendment conferred on the courts by the act do not enable them to restore the lien when it has been discharged by non-compliance with this mandate. Required indorsements must be made. *Wheeler v. Almond*, 17 Vroom (N. J. L.) 161.

⁸ *Neuchatel Asphalt Co. v. New York*, 9 Misc. (N. Y.) 376, 30 N. Y. Supp. 252.

⁹ *Coggan v. Reeves*, 3 Ore. 275. The mere filing of an appearance by said intervening petitioners after notice served on them was not the commencement of a suit to enforce their lien, within such statute. *Davis v. Arthur*, 170

Mass. 449, 49 N. E. 739. See *Goff v. Hosmer*, 20 R. I. 91, 37 Atl. 533, and *Tingley v. White*, 17 R. I. 533, 23 Atl. 100, as to construction of Rhode Island statutes. See *Piper v. Hoyt*, 61 Vt. 539, 17 Atl. 798, where it is required that the property must be attached before the action is commenced.

Community Property. — Where an action to foreclose a mechanic's lien was begun against community property, and one of the owners thereof was not made a party until more than a year after the lien notice was filed, the judgment of foreclosure was void, though valid as a personal judgment against the community, under 2 Ballinger's Ann. Codes & St. § 5908, requiring the foreclosure action to be commenced within eight months of the filing of the claim; and the defense is not waived by failure to plead, the bringing of the action within the required time being a jurisdictional fact to be shown by plaintiff. *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397.

¹⁰ *Mann v. Schroer*, 50 Mo. 306. Amendment of claim, see § 99.

the time limit it would stand as an original action and not be lost.¹¹ In some states there is a general provision of practice that in all cases where there has been an attempt to commence an action that a certain time will be allowed to amend after the court has held the first action invalid.¹² If the statute provides that the action must be brought not later than a certain date and it is prolonged beyond that time, the lien will be lost.¹³ If the property goes into the hands of a receiver the claimant will not be cut out for failure to diligently prosecute as the receiver is supposed to take up such matters.¹⁴ And if a party is once in court, he cannot generally lose his rights, if he exercises ordinary diligence to have the same looked after.¹⁵ A former statute of New York required the

¹¹ *Walker v. Burt*, 57 Ga. 20; *Wheeler v. Almond*, 46 N. J. L. 161.

¹² *Rice v. Brown*, 1 Kan. App. 646, 42 Pac. 396; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22. If a lien should be prematurely filed, and a second is filed within the period allowed, the first being inoperative, the second will be valid. *Davis v. Schuler*, 38 Mo. 24.

¹³ *California*.—*Green v. Jackson Water Co.*, 10 Cal. 374.

Indiana.—*Kulp v. Chamberlain*, 4 Ind. App. 560, 31 N. E. 376.

Minnesota.—*Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753; *Steinmetz v. St. Paul Trust Co.*, 50 Minn. 445, 52 N. W. 915.

Mississippi.—*Dinkins v. Bowlers*, 49 Miss. 219.

New York.—*Mushlitt v. Silvermann*, 50 N. Y. 360.

Tennessee.—*Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136.

Where a lien claimant appears in such an action for

the purpose of asserting his lien, he makes the action his own for the purpose of enforcing his lien, and if he is in time, the fact that plaintiff's lien is barred or that plaintiffs from any cause fail to recover, will not affect him. *Burns v. Phinney*, 53 Minn. 431, 55 N. W. 540. See § 188.

¹⁴ *Ennis v. Eden Mills Paper Co.*, 65 N. J. L. 577, 48 Atl. 610.

¹⁵ *Abham v. Boyd*, 5 Daly (N. Y.) 321. Under Pub. St. (Mass.) c. 191, § 9, a suit to enforce a mechanic's lien must be commenced within 90 days after the party ceased to labor or furnish material for the building. Where a petition filed December 13th stated the last material was furnished September 13th, but was amended by changing the date to September 15th, it was too late after the amendment was allowed, and evidence introduced to support it, to object that the petition was not filed in time. *Burrell v. Way*, 176 Mass. 164, 57 N. E. 335.

lien to be reduced to judgment within a certain time, but this was regarded as a harsh rule and it is now sufficient generally to begin the action within the time limit and follow it up with ordinary diligence.¹⁶

§ 221. **Parties plaintiff.**—The codes of procedure of all the states require that the action shall be brought in the name of the real parties in interest.¹ But the party should have an interest in the lien and not merely an interest in the result of the action.² Where the interest is joint, as where two or more persons have furnished work or materials, the general rule is that they may join as plaintiffs.³ Some courts however hold that if their interests are not joint they cannot join as plaintiffs.⁴ Other courts have held,—and it seems to the writer very properly,—that where the person is a necessary party it is immaterial whether he be a plaintiff or a defendant in the action and that all or any such persons may join as plaintiffs.⁵ A party who does business under an assumed name can bring action in that name.⁶ An undisclosed princi-

¹⁶ *Benton v. Wickwire*, 54 N. Y. 226; *North Star Iron Works Co. v. Strong*, 33 Minn. 1, 21 N. W. 740; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347, 36 Pac. 273.

¹ Joinder of several parties claiming interest, see § 204. See Dec. & Am. Dig. tit Mechanics' Liens § 262.

² *Roberts v. Gates*, 64 Ill. 374.

³ *Rockwood v. Walcott*, 3 Allen (Mass.) 458.

⁴ *Roberts v. Gates*, 64 Ill. 374. Rev. St. Ind. 1897, § 5299, authorizing consolidation of actions by different lien claimants and providing that all lien claimants may be made parties, does not permit claimants having several interests to join as plaintiffs. *Northwestern Loan & Inv. Assn.*

v. McPherson, 23 Ind. App. 250, 54 N. W. 130.

⁵ *Freeze v. Avery*, 57 App. Div. (N. Y.) 633, 69 N. Y. Supp. 150. "A proceeding to enforce a mechanic's lien is, in effect, a suit in chancery, and the rules that govern causes in equity usually control cases instituted under the statutes to enforce a mechanic's lien. The general rule in courts of equity, as to parties, is, that all persons materially interested in the subject matter ought to be made parties to the suit, either as plaintiffs or defendants. Story's Equity Pleading, sec. 76." *Lombard v. Johnson*, 76 Ill. 599.

⁶ Where a contractor does business for an undisclosed principal as "H., agent," and files a lien

pal may sue to enforce the lien and all defenses are available against him, that would have been available against the agent.⁷ It is generally held that a contractor and a subcontractor have not such a joint interest that they can unite in bringing the action.⁸ Where the contract or a lien has been assigned and the contractor has no further interest in the matter, the person holding the claim should bring the action in his own name,⁹ and he may pursue the matter further and recover a personal judgment if necessary.¹⁰ Where the assignor still retains some interest in the claim both of them may join in the action.¹¹ And even if the assignor has no interest it will not be error for him to join.¹² In case the claim is assigned while the action is pending it is proper, although not necessary, to make the assignee a party.¹³

In that name, a petition to foreclose is properly brought in the same name. *Hooker v. McGlone*, 42 Conn. 95.

⁷ *Berry v. Gavin*, 88 Hun (N. Y.) 1, 34 N. Y. Supp. 505.

⁸ *Barker v. Maxwell*, 8 Watts (Pa.) 478.

⁹ Assignment of lien, see § 167. *Goff v. Papin*, 34 Mo. 177; *Hallahan v. Herbert*, 57 N. Y. 409; *McDonald v. Kelly*, 14 R. I. 335; *Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151, 21 L. ed. 775. Where an owner agrees to deal with the assignee of the original contractor for the construction of a house, "as if he were the original contractor," such assignee can, in his own name, enforce a lien, though he agreed to pay the assignor a certain part of the profits. *Pensacola R. Co. v. Schaffer*, 76 Ala. 233.

¹⁰ *House v. Schulze*, 21 Tex. Civ. App. 243, 52 S. W. 654.

¹¹ If not a party plaintiff, he should be made a defendant. *Hamilton v. Whitson*, 5 Kan. App. 347, 48 Pac. 462.

¹² *Moore v. Dugan*, 179 Mass. 153, 60 N. E. 488.

¹³ *Phoenix Mut. Life Ins. Co. v. Batchen*, 6 Ill. App. 621.

Parties to action—Who are not.—Persons whose names are inserted as parties defendant in a petition, but who are not served with notice and do not appear, are not parties to the action. *Vreeland v. Ellsworth*, 71 Iowa 347, 32 N. W. 374.

Proof.—Under Colorado Statutes, § 2894, providing that any party claiming a lien may assign the same in writing, it is not necessary, in a proceeding by the assignee to enforce a mechanic's lien, that he should allege and prove that the assignment was in writing, unless the fact is denied. *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64.

§ 222. **Parties defendant generally.**—While some of the earlier statutes have caused the courts to regard the action to foreclose a mechanic's lien as an action at law,¹ it is not generally so regarded and even where it is so regarded, the equitable rule prevails that all persons who are interested² in the controversy should be made parties in order that there may be an end to litigation.³ Under this equitable rule, a person is either a "proper party" or a "necessary party." These terms have been well defined by an authoritative writer

¹ See §§ 11, 196, 197. See Dec. & Am. Dig. tit Mechanics' Liens § 263.

² *Glos v. John O'Brien Lumber Co.*, 183 Ill. 211, 55 N. E. 712.

³ **Trustee and cestui que trust.**—

"In this case, Brown was the sole defendant, while the record of deeds of the county where the premises were situated showed that the legal title was in another in trust for others, Brown having only an equity of redemption. This trustee and the cestuis que trust should have been made parties, and the demurrer reached this objection." *Lomax v. Dore*, 45 Ill. 379. All persons whom the petition shows to be interested should be made parties and brought into court. *Race v. Sullivan*, 1 Ill. App. 94. In the case of *Williams v. Bankhead*, 19 Wall. (U. S.) 563, 22 L. ed. 184, the supreme court, in considering the question of parties to proceedings in chancery, laid down the following general propositions: "The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in

order that there may be an end of litigation. But there are qualifications of this rule growing out of public policy and the necessities of particular cases: First, Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, Where a person is interested in the controversy, but will not be directly affected by a decree in his absence, he is not an indispensable party, but should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant." *Harrison, &c., Iron Co. v. Council Bluffs City Water-works Co.*, 25 Fed. 170. *Surety on bond. Vitelli v. May*, 120 App. Div. (N. Y.) 448, 104 N. Y. Supp. 1082.

who fully recognizes the inaccurate and careless use to which these terms have been subjected.⁴ A person is not properly a party to any action until served.⁵

§ 223. **Parties defendant—Necessary.**—All persons against whom a priority of lien is claimed,¹ or where no relief can be granted to the plaintiff without such person being made a

⁴ **General principles.**—In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant; namely, (1) those who are "necessary," and (2) those who are "proper." Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. Confusion has frequently arisen from a neglect by text-writers and even judges, to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper. Thus, because a decree cannot be rendered, which shall determine the rights of a certain class of individuals without making them defendants in the action, they are not unfrequently called necessary parties; or, in other words, because they must be joined as defendants in a particular suit, in

order that the judgment therein may bind them, they are denominated "necessary" parties absolutely. Such persons are "necessary" sub modo—that is, they must be brought in if it is expected to conclude them by the decree; but to call them "necessary" absolutely is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. This inaccurate use of language would make every person a necessary party who should actually be joined as a co-defendant in an equitable action. Pomeroy's Remedies and Remedial Rights, 2 Ed., Sec. 329.

⁵ See § 232.

¹ *Johnson v. Bennett*, 6 Colo. App. 362, 40 Pac. 847; *Clarke v. Ratcliffe*, 7 How. (Miss.) 162. Under Code Civ. Proc. N. Y., § 3402, providing that all lienors having claims against the same property are necessary parties to an action to enforce a lien, and laws 1897, c. 418, § 9, subd. 7, providing that the failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien, the failure of a lienholder, in foreclosing his lien, to make another

party, are necessary parties.² Where a bond is filed to discharge the lien on the property, all persons who would be necessary in an action to foreclose a lien, must be made parties to an action on the bond.³ The sureties on such bonds are necessary parties,⁴ and the courts have generally held that the contractor should likewise be made a party.⁵ If the statute specifically directs that certain persons must be made parties, the action cannot be maintained unless the statutory provision is complied with.⁶ In suing a partnership, it is

lienor, who made a mistake in naming the owner in his lien, and was not discovered by plaintiff until such fact was pleaded in the answer, a party to his action, after being discovered, is fatal. *Gaas v. Souther*, 61 N. Y. Supp. 305, affirmed, 167 N. Y. 604, 60 N. E. 1111. See, subsequent divisions of this subdivision.

² *Maneely v. New York*, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976. A material man's lien cannot be enforced until the claim secured is adjudicated, and hence parties to be charged with the debt are necessary parties to a proceeding to enforce the lien, and, in the absence of service on them, a judgment cannot be rendered authorizing a sale of the property. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991. In an action to foreclose a mechanic's lien, it appeared that defendant E. contracted to put an electric light plant in a building owned by defendant D. Defendant E. contracted with plaintiffs to furnish the engine and fixtures, and plaintiffs procured the order on E. for the price of the engine:

"Please pay M. the sum of \$1,250, and charge the same to our account of the D. engine; the payment to be made when the money is due, as per terms and conditions of our contract with you for the above plant." The order was an assignment of the fund in E.'s hands, and M. should be made a defendant, though it had filed no lien and was a non-resident. *Williams v. Deutscher Verein*, 14 N. Y. Supp. 368.

³ *Brandt v. Bradley*, 23 N. Y. Supp. 277. Persons jointly liable. *Seary v. Wegenaar*, 104 N. Y. Supp. 1055, 120 App. Div. (N. Y.) 419.

⁴ *Jones v. McKenzie*, 20 Misc. (N. Y.) 222, 45 N. Y. Supp. 412.

⁵ *Maneely v. New York*, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976; *Warner v. A. H. Wates & Co.*, 118 Tenn. 548, 102 S. W. 92.

⁶ *O'Brien v. Gooding*, 194 Ill. 466, 62 N. E. 898; *Rumsey, &c., Co. v. Pfeffer*, 108 Mo. App. 486, 83 S. W. 1027; *Brown v. Danforth*, 37 App. Div. (N. Y.) 321, 55 N. Y. Supp. 825. Where prior mortgages cannot be brought in, *Central Trust Co. v. Bartlett*, 57

held not to be error if one partner only is made a party.^{6a} If the original contracting owner has sold the property and the purchaser has not assumed the debt, such owner is held to be a necessary party.⁷ Where a contract was made with a corporation that became civilly dead before the proceedings were commenced, it is not necessary that such corporation be made a party.⁸ So, a person whose interest in the property is acquired while the suit is pending is not a necessary party.⁹ And if only an equitable title is sought to be foreclosed the owner of the legal title is not a necessary party.¹⁰ In no case is a person considered a necessary party where he will not be prejudicially affected by the decree that may be rendered.¹¹

§ 224. **Parties defendant—Proper.**—It may be laid down as a general principle that all parties who have any right, title or interest in the real estate should be made parties defendant or they will not be affected by the decree that the court may make.¹ And likewise all persons whose interests are such that they should be in court in order that a full determination

N. J. L. 206, 30 Atl. 583. All lienors must be made. *Maneely v. New York*, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976.

^{6a} *Putnam v. Ross*, 55 Mo. 116.

⁷ *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737; *Walter v. Dearing*, (Tex. Civ. App.), 65 S. W. 380.

⁸ *Jennings v. Hinckle*, 81 Ill. 183.

⁹ *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912. A purchaser pendente lite need not be made a party to a mechanic's lien proceeding. *Mosier v. Flanner-Miller Lumber Co.*, 66 Ill. App. 630. A mortgagee who takes his mortgage pending

an action to foreclose a mechanic's lien is not a necessary party to that action. *Middleton v. Davis-Rankin Bldg. & Mfg. Co.* (Ky.), 45 S. W. 896, 20 Ky. L. 263.

¹⁰ *Sheppard v. Messenger*, 107 Iowa 717, 77 N. W. 515.

¹¹ *Hawkins v. Mapes-Reeve Const. Co.*, 82 App. Div. (N. Y.) 72, 81 N. Y. Supp. 794.

¹ *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273; *Nashua Trust Co. v. W. S. Edwards Mfg. Co.*, 99 Iowa 109, 68 N. W. 587, 61 Am. St. 226; *Schaeffer v. Lohman*, 34 Mo. 68. See Dec. & Am. Dig. tit Me-
chanics' Liens § 263.

of all questions may be had, are proper parties.² Though a contractor has been discharged by an act of bankruptcy that does not make him an improper party defendant.³ So sureties on a bond given the owner for his protection while not necessary are yet proper parties.⁴ Under the common law rule a wife could not be sued unless her husband was joined in the action with her and where such common law rule is in force, the husband is not only a proper, but, it might be said, a necessary party.⁵ If the wife has no power to contract it is still proper to make the husband a party if he made the contract and his interest is subject to sale to satisfy the lien.⁶ But where the wife holds title to the real estate, the action can not be maintained against the husband alone.⁷ In order to be a party he must have an interest in the property.⁸ And it would be advisable in order to cut off any possible interest he might have to make him a party where suit is brought to foreclose on the wife's real estate.⁹ In

² **Georgia.**—Gress Lumber Co. v. Rogers, 85 Ga. 587, 11 S. E. 867.

Indiana.—Davis, &c., Bldg. & Mfg. Co. v. Vice, 15 Ind. App. 117, 43 N. E. 889.

New York.—Williams v. Edison Electric Illuminating Co., 16 N. Y. Supp. 857, 43 N. Y. St. 126; Whisteen v. Kellogg, 50 Misc. (N. Y.) 409, 100 N. Y. Supp. 526.

Virginia.—Pairo v. Bethell, 75 Va. 825. "It was not improper to make Sherman a party; and for the same reason that the subsequent incumbrances were joined, that he and they being interested, might have an opportunity to resist the lien claimed, and that the plaintiff might the more conclusively establish his lien upon the property, and against them and their respective interests. But it is

quite a different thing to ask and obtain a personal judgment against him." Mervin v. Sherman, 9 Iowa 331.

³ Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737.

⁴ Haberzettle v. Dearing (Tex. Civ. App.), 80 S. W. 539; Maneely v. New York, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976.

⁵ Fink v. Hanegan, 51 Mo. 280; Latshaw v. McNess, 50 Mo. 381.

⁶ Kirby v. Tead, 13 Metc. (Mass.) 149.

⁷ Roman v. Thorn, 83 Ala. 443, 3 So. 759.

⁸ Kirby v. Tead, 13 Metc. (Mass.) 149.

⁹ Scott v. Goldinhorst, 123 Ind. 268, 24 N. E. 333; Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811; Becker v. Price, 1 Lack. Leg. Rec. (Pa.) 483.

suits brought to foreclose a lien on community property, both husband and wife are not only proper, but may be said to be necessary parties.¹⁰ The wife should be made a party though she merely holds an inchoate right of dower. The Illinois courts hold that she is not,¹¹ and the Wisconsin courts that she is a proper party.¹² In all cases it is safer to make both husband and wife parties where an action is sought to foreclose a lien on the property of one of them.

§ 225. Parties defendant—Owners of legal title.—In all cases, the person who is the owner of the legal title at the time of the foreclosure suit is a necessary party.¹ If the

¹⁰ *Hausmann Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587, 67 N. W. 1136; *Weston v. Weston*, 46 Wis. 130, 49 N. W. 834; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996. But if the husband held the paper title and it was not known that he had a wife, it is not necessary that she be a party. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445, 39 Pac. 115. And so if a homestead is sought to be used in the satisfaction of the lien. *San Antonio Real Estate Bldg. & Loan Assn. v. Stewart*, 94 Tex. 441, 61 S. W. 386, 86 Am. St. 864. But not if the lien attached before it was used as a homestead. *Watkins v. Spoull*, 8 Tex. Civ. App. 427, 28 S. W. 356.

¹¹ *Shaeffer v. Weed*, 8 Ill. 511.

¹² The wife of the owner of land upon which a mechanic's lien is claimed, is a proper party to an action to enforce such lien, even though she was not a party to the building contract under

which the lien is claimed and the premises are not a homestead, and even though her inchoate right of dower cannot be divested in such action. *Hausmann Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587, 67 N. W. 1136.

¹ *Colorado*.—*Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912.

Massachusetts.—*Peabody v. Eastern Methodist Society*, 5 Allen (Mass.) 540.

Nebraska.—*Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Manly v. Downing*, 15 Neb. 637, 19 N. W. 601.

New Jersey.—*Babbitt v. Condon*, 27 N. J. L. 154.

Pennsylvania.—*Hampton v. Broom*, 1 Miles (Pa.) 241.

Washington.—*Wright v. Cowie*, 5 Wash. 341, 31 Pac. 878. In case the party is a trustee, there must be a proper designation or it will be presumed that he is sued individually. *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, 38 Am. St. 899. "The church, if incor-

owners of different properties jointly contract for a building, then all holding a legal title are necessary parties.² In the case of partnership, the partners, or where there are joint contracting owners, all the owners should be made parties, but it will not be fatal to the action if they are not made parties. The only effect is that the person not made a party will not be bound,³ for it is a general principle that interested parties are not bound by decrees to which they are not parties.⁴ The owner at the time suit is brought and not the one acquiring an interest afterwards is the necessary party.⁵ Where the owner of the property upon which the lien has attached sells it he is not a necessary party, although he may be a proper party.⁶ The decree is a nullity as to a person not made a

porated, should have been sued by its corporate name. If not, the individual members of the church might have been sued collectively, or under section 1680 of the Code of 1851, if they were too numerous and it was impracticable to bring them all before the court, then one or more could have been sued, who could have defended for the whole, provided Tracy acted as their agent. In either event, whether against the corporation as such, or against the individual members of the church, the Catholic Bishop holding the legal title should also have been made a party." *Keller v. Tracy*, 11 Iowa 530. The plaintiff was excused for not making him a party at the time of the commencement of the action, as a search against the premises did not disclose the lien. There was no excuse, however, for not bringing him in after his lien was made to appear.

Gass v. Souther, 46 App. Div. (N. Y.) 256, 61 N. Y. Supp. 305.

² *Carter Lumber Co. v. Simpson*, 83 Tex. 370, 18 S. W. 812; *J. A. Treat Lumber Co. v. Warner*, 60 Wis. 183, 18 N. W. 747.

³ *Fowler v. Bailley*, 14 Wis. 125; *Johnson v. Weinstock*, 31 La. Ann. 698.

⁴ *White v. Chaffin*, 32 Ark. 59. Where one in actual possession under an unrecorded deed at the beginning of an action to enforce a mechanic's lien is not made a party thereto, he is not affected by the decree rendered therein. *Monroe v. Hanson*, 47 Neb. 30, 66 N. W. 12.

⁵ *McCoy v. Quick*, 30 Wis. 521.

⁶ *Connecticut*.—*Rose v. Persse, &c., Paper Works*, 29 Conn. 256.

Delaware.—*Carswell v. Patzowski*, 4 Penne. (Del.) 403, 55 Atl 342.

Indiana. — *Kellenberger v. Boyer*, 37 Ind. 188; *Marvin v. Taylor*, 27 Ind. 73; *Holland v.*

party.⁸ The omission to make a subsequent purchaser a party may be taken advantage of by the person against whom it originally accrued.⁹ A better way would be to make both the original owner and subsequent purchasers parties.¹⁰ However if there is nothing to show that the original owner has some interest, it would not be error to omit making him a party.¹¹

§ 226. **Parties defendant—Fraudulent vendees.**—A person to whom the property has been fraudulently conveyed should be made a party.¹² But it would not be necessary so to do if the action is commenced before the conveyance.¹³

§ 227. **Parties defendant—Executors and administrators—Effect of failure to join proper parties.**—Where the owner dies after having made the contract his legal heirs should be

Jones, 9 Ind. 495; Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811. Not necessary, but proper party. Schaeffer v. Lohman, 34 Mo. 68; Pickens v. Polk, 42 Neb. 267, 60 N. W. 566. Under a peculiar statute, where judgment is first required and then a suit is brought to enforce the judgment, such owner is a necessary party in the first suit, and the present owner is not, but in second suit the present owner is a necessary party. Colley v. Doubgty, 62 Me. 501.

⁸ Marvin v. Taylor, 27 Ind. 73. But the law repudiates the idea of condemning the property of one man to pay the debt of another, without giving him an opportunity in court, upon due service of process, of showing that the claim ought not to be asserted against his property. Clark v. Brown, 25 Mo. 559.

⁹ Clark v. Brown, 25 Mo. 559. There may be cases where the subsequent purchaser is an indispensable party, as where there were 12 houses built and three sold. Ortwine v. Caskey, 43 Md. 134.

¹⁰ Edwards v. Derrickson, 28 N. J. L. 39.

¹¹ Cullers v. First Nat. Bank (Tex. Civ. App.), 29 S. W. 72; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325. Leashold estates. Original lessee not necessary party. Southard v. Moss, 2 Misc. (N. Y.) 121, 20 N. Y. Supp. 848.

¹² Lindley v. Cross, 31 Ind. 106, 99 Am. Dec. 610; Meehan v. Williams, 36 How. Pr. (N. Y.) 73, 2 Daly (N. Y.) 367.

¹³ Bierschenk v. King, 38 App. Div. (N. Y.) 360, 56 N. Y. Supp. 696.

made parties defendant.¹ If there is an administration on his estate the administrator² or executor is a proper party defendant.³ The courts are not in accord upon the question of whether an executor is a necessary party if title is not in him, but all agree that he is a proper party.⁴ And some courts lay down the rule, that, unless an administrator bringing an action to sell real estate, must make the heirs parties, then the heirs are not necessary parties in foreclosure of a lien.⁵ Of course, if the debtor had no interest when he died, neither the heir, administrator or executor is a necessary party, although he may sometimes be a proper party.⁶ As a general rule, the mere failure to join proper parties will

¹ *Simonds v. Buford*, 18 Ind. 176. In some states by express provision, the heirs need not be made a party. *Welch v. McGrath*, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638. In a proceeding for a mechanic's lien, the administrator of the defendant's estate may properly be made a party, and if the plaintiff takes a judgment without making the heirs a party, he does it at his peril. *Mix v. Ely*, 2 G. Greene (Iowa) 513.

² *Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 38 Am. St. 105, 16 L. R. A. 600n; *Welch v. McGrath*, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638; *Guerrant v. Dawson*, 34 Miss. 149. The jury has nothing to do with the question as to who are proper parties. *Van Billard v. Nace*, 1 Grant Cas. (Pa.) 233.

³ *Robins v. Bunn*, 34 N. J. L. 322.

⁴ *Crystal v. Flannelly*, 2 E. D. Smith (N. Y.) 583.

⁵ "It is held to be unnecessary to make the heirs at law parties to a proceeding to sell real estate

of decedent for the purpose of paying his debts, for the reason that the proceedings and sale are sufficient notice to them. We have the same character of notice in the proceedings and sale on a mechanic's lien, and if the notice is sufficient in one case, why not in the other?" *Reece v. Haymaker*, 25 Pittsb. Leg. J. (N. S.) (Pa.) 74.

⁶ *Security Mortgage & Trust Co. v. Caruthers*, 11 Tex. Civ. App. 430, 32 S. W. 837. We are therefore of the opinion that, where the debtor who was the owner has ceased to have an interest in the estate, and has deceased, and his estate has been settled, and the time for presenting claims has passed and there were no assets for his heirs, his administrator is not a necessary party, even though he is a proper party, to proceedings to enforce a mechanic's lien. *Holmes v. Humphreys*, 187 Mass. 513, 73 N. E. 668.

not prevent the court from rendering a decree, which however, is only binding on those properly in court.⁷ However, if the statute requires that a certain person be made a party, this matter then becomes jurisdictional and no valid decree can be rendered without it.⁸

§ 228. Parties defendant—Mortgagees and incumbrancers.—

Where it is sought to foreclose a lien on premises incumbered by mortgages,¹ and mortgages in the nature of trust deeds, both beneficiary and the trustee are necessary defendants.² Even if the debt secured by the mortgage or trust deed is not yet due they should be made parties,³ so that all

⁷ *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707; *Laviolette v. Redding*, 4 B. Mon. (Ky.) 81; *Horstkotte v. Menler*, 50 Mo. 158; *Carney v. La Crosse, &c.*, R. Co., 15 Wis. 503.

⁸ *Johnson-Frazier Lumber Co. v. Schuler*, 49 Mo. App. 90; *Baker v. Pagaud*, 26 La. Ann. 220.

¹ *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413.

² *Colorado*.—*McClair v. Huddart*, 6 Colo. App. 493, 41 Pac. 832.

Illinois.—*Bennitt v. Wilmington Star Min. Co.*, 119 Ill. 9, 7 N. E. 498; *Clark v. Manning*, 95 Ill. 580; *Columbia Bldg. & Loan Assn. v. Taylor*, 25 Ill. App. 429; *Phoenix Mut. Life Ins. Co. v. Batchen*, 6 Ill. App. 621. Mortgagee is not an owner. *Tompkins v. Horton*, 10 C. E. Green (N. J. Eq.) 284. The general equity rule is that all persons interested in the subject-matter of the litigation must be made parties in order that the decree may affect their rights, and

this rule requires that both the trustees and cestui que trust be made parties in suits respecting the trust property. *McGraw v. Bayard*, 96 Ill. 146.

Where trustee not necessary party.—A subcontractor notified defendant of the amount due him from the contractor for materials furnished for a building which the contractor was erecting for defendant. The subcontractor demanded payment from both defendant and the contractor, but both refused payment. The day before the contractor filed his lien against the building the defendant gave the contractor a note for a large sum owing the latter, and secured it by a deed of trust of all of defendant's property. The trustee need not be made a party to the action to enforce the lien. *Lookout Lumber Co. v. Mansion Hotel, &c.*, R. Co., 109 N. Car. 658, 14 S. E. 35.

³ *North Presbyterian Church v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261.

questions in reference to the title may be settled.⁴ If such pre-existing mortgage claimants should not be made parties, their claims will retain the same degree of priority that existed before the action was brought.⁵ If a mortgage secures several notes and the record does not disclose the ownership, then the holders of such notes are not necessary parties.⁶ Omission to make a mortgagee of part of the property affected by the lien a party defendant will not operate to release other parts of the property covered by the mortgage even though sufficient property remains to secure the mortgage.⁷ If the holder of the mortgage should die, his executor or administrator is the proper party to collect the same, and he therefore becomes a necessary party in an action to foreclose a lien on the property covered by the mortgage.⁸ As a general rule, it may be said that lienors and incumbrancers, where the person seeking the foreclosure of a lien desires no priority over them, are not necessary parties.⁹ But it would be better practice to make them parties.¹⁰ Of course, if not made parties their rights remain as they are,¹¹ and they will not be affected or precluded by a decree;¹² as to them, a decree

⁴ Bassett v. Menage, 52 Minn. 121, 53 N. W. 1064.

⁵ Williams v. Chapman, 17 Ill. 423, 65 Am. Dec. 669; Hicks v. Scofield, 121 Mo. 381, 25 S. W. 755; Russell v. Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. 563. An action is not pending until the party is served. Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. 354.

⁶ Landau v. Cottrill, 159 Mo. 308, 60 S. W. 64; Portones v. Badenoch, 132 Ill. 377, 23 N. E. 349.

⁷ Badger Lumber Co. v. Ballentine, 54 Mo. App. 172.

⁸ Shields v. Keys, 24 Iowa 298.

⁹ Sharon Town Co. v. Morris, 39

Kan. 377, 18 Pac. 230; Kenney v. Apgar, 93 N. Y. 539.

¹⁰ Subsequent incumbrancers are also regarded as necessary parties because a perfect title could not be given under the decree and sale; but the presence of such incumbrancers is not indispensable to the decree of foreclosure. It may be given and rendered without them, but such as are not made parties are not cut off or bound by the decree. Osborn v. Logus, 28 Ore. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

¹¹ Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748; McKim v. Mason, 3 Md. Ch. 186.

¹² Clark v. Moore, 64 Ill. 273;

will be legal, but not binding upon their rights.¹³ While the holder of the lien or an incumbrance attaching after the commencement of a suit might not be a necessary party unless the lien was one in its nature affecting the mechanic's lien, it will be very proper for the court to let him come in and set up his claim.¹⁴ And so a subsequent purchaser is held to be a proper but not necessary party.¹⁵

§ 229. **Parties defendant—Contractor.**—As a general rule, the subcontractor's rights not only rest on those between the contractor and the owner, but the state of account between the subcontractor and the contractor is such that it is necessary to make the contractor a party to the action.¹ But even if he were not a necessary party he is certainly a very

McLagan v. Brown, 11 Ill. 519. Holders of a vendor's lien and a mortgage on certain premises are not necessary or indispensable parties to a suit to enforce a mechanic's lien against property on the premises, where complainant does not seek priority over such liens, as they cannot be prejudiced by the suit. *Case Mfg. Co. v. Smith*, 40 Fed. 339, 5 L. R. A. 231.

¹³ *Evans v. Tripp*, 35 Iowa 371.

¹⁴ *Western Brass Mfr. Co. v. Boyce*, 74 Mo. App. 343, *Stuydam v. Holden*, 11 Abb. Pr. (N. S.) (N. Y.) 329.

¹⁵ *Kaylor v. O'Connor*, 1 E. D. Smith (N. Y.) 672; *Rice v. Hall*, 41 Wis. 453; *McCoy v. Quick*, 30 Wis. 521; *Hall v. Hinckley*, 32 Wis. 362; *Harrington v. Latta*, 23 Neb. 84, 36 N. W. 364.

Pending suit.—In *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428, it was held, Chief Justice Waite writing the opinion of the court, that the

procuring of a judgment during the pendency of a suit to foreclose a mortgage was in legal effect no more and no less than an incumbrance of the equity of redemption by the mortgagor, under the operation of judicial proceedings which had been instituted against him to enforce the payment of a debt he owed and that as such incumbrance was created pendente lite, the judgment creditor was bound by the foreclosure proceedings, although not a party to the action. See also, *Comer v. Dodson*, 22 Ohio St. 615.

¹ **California.**—*Wood v. Oakland, &c., Rapid Transit Co.*, 107 Cal. 500, 40 Pac. 806.

Colorado.—*Estey v. Hallack, &c., Lumber Co.*, 4 Colo. App. 165, 34 Pac. 1113; *Davis v. John Mouat Lumber Co.*, 2 Colo. App. 381, 31 Pac. 187.

Georgia.—*Lombard v. Trustees of Young Men's Library Assn.*

proper party.² However if the contractor has assigned all

Fund, 73 Ga. 322. Unaccepted order on owner. *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863.

Michigan.—*Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62.

Missouri.—*T. A. Miller Lumber Co. v. Olver*, 65 Mo. App. 435; *Bombeck v. Devorss*, 19 Mo. App. 38. Where the statute required the action to be against "builder and owner," it was improper to make the administrator of the builder a party under the former New Jersey statute. *Ayres v. Revere*, 25 N. J. L. 474.

New Jersey.—*Sinnickson v. Lynch*, 25 N. J. L. 317.

North Carolina.—*Lookout Lumber Co. v. Mansion Hotel, &c.*, R. Co., 109 N. Car. 658, 14 S. E. 35.

Pennsylvania. — *Barnes v. Wright*, 2 Whart. (Pa.) 193.

Texas.—*Thomas v. Ownby*, 1 Tex. App. Civ. Cas. § 1212.

Practice.—In an action by a subcontractor to enforce a lien, the original contractor is a necessary party. If he be named as a defendant in the title of the action, but not brought in as a party by service of the summons on him, the proper practice is for the court, upon the suggestion of the fact, to continue the action or delay the trial until he be brought in as a party. If the plaintiff has unreasonably delayed to make such service, a motion may be made to dismiss the action. *Northwestern Cement & Concrete Pav. Co. v. Norwegian-*

Danish, &c., Seminary, 43 Minn. 449, 45 N. W. 868.

Indispensable party. — Laws, Colo. 1883, p. 23, § 25 (Mills' Ann. St. § 2891), relating to mechanics' liens, provides that the court may proceed to hear and determine said liens and claims; that judgment shall be rendered according to the rights of the parties; that the various rights of all the lien claimants and other parties in any such action shall be determined and incorporated in one judgment or decree; that each party who shall establish his claim shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established in said decree upon the property to which his lien shall have attached to the extent hereinbefore stated. Held, that the contractor was an indispensable party to an action by a material man to establish and foreclose a mechanic's lien against the owner, since the right to a lien is dependent upon the indebtedness of the contractor. *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445.

Nullity if not party.—If such a contractor is not made a party, this decree is a nullity as to him, and, after completing his contract and complying with the statute, he may bring suit to enforce his lien. *Wakefield v. Van Dorn*, 53 Neb. 23, 73 N. W. 226.

² *Trammell v. Hudmon*, 78 Ala.

his interests or abandoned the contract so that he has no possible interest in the litigation, then it is not necessary to make him a party.³ Some courts have held that the fact that the owner allowed the trial to proceed without urging the necessity of making the contractor a party will not waive such irregularity.⁴ The fact that the contractor has absconded will not excuse a failure to make him a party since service of process can be had on him by publication.⁵ Under statutes that make the owner directly responsible to subcontractors when their rights are fixed as required by statute, the contractor is not a necessary party.⁶ All persons personally liable where personal judgment is sought are proper parties defendant.⁷ But if the liability is not joint they are not all necessary parties,⁸ and generally, it is sufficient if one of several

222; *Royal v. McPhall*, 97 Ga. 457, 25 S. E. 512; *Walkenhorst v. Coste*, 33 Mo. 401; *Slade v. Amarillo Lumber Co.* (Tex. Civ. App.), 93 S. W. 475.

³ *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331. To a subcontractor. *Kloppinger v. Grasser*, 25 Ohio C. C. 90.

⁴ *Union Pac. R. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095; *Estey v. Hallack, &c.*, *Lumber Co.*, 4 Colo. App. 165, 34 Pac. 1113.

⁵ *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772.

⁶ *Georgia*.—*Wilder's Sons Co. v. Walker*, 98 Ga. 508, 25 S. E. 571.

Indiana.—*Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534; *Crawfordsville v. Barr*, 65 Ind. 367; *Leeper v. Meyers*, 10 Ind. App. 314, 37 N. E. 1070.

Oregon.—*Hand Mfg. Co. v. Marks*, 36 Ore. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549. Under

the Ohio law, where the subcontractor does not file his claim with the recorder, and thus notify the contractor of his claim, he should make the contractor a party in his action against the owner. *Geller v. Puchta*, 1 Ohio C. C. 30, 1 Ohio Cir. Dec. 18. Under statutes that make the contractor the owner's agent, he is not an indispensable party, but if not made a party his rights remain. *Osborn v. Logus*, 28 Ore. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

⁷ *McDonald v. Backus*, 45 Cal. 262. Where the principal contractors divided the work, one taking the carpenter and the other the stone work, both should have been made parties, on suit of a subcontractor. *Harbeck v. Southwell*, 18 Wis. 418.

⁸ *Hassett v. Rust*, 64 Mo. 325; *Baldinger v. Levine*, 83 App. Div. (N. Y.) 130, 82 N. Y. Supp. 483.

joint contractors be a party, where a subcontractor forecloses his lien under such joint contract.⁹ Where two or more contractors furnish materials on the same building under separate contracts and one forecloses he should make the others parties.¹⁰ One who purchases as an agent for another is neither a proper nor a necessary party.¹¹ The better rule is,—and some statutes so require,—that all persons claiming mechanics' liens are proper if not necessary parties in the foreclosure of the lien of one of them on the premises.¹² Of course, if they have been paid off and have no interest, the record should not be incumbered by bringing them in as parties.¹³

§ 230. Party by addition, substitution or intervention.—The matter of bringing the person in as a party by way of addition, substitution or intervention is a matter of practice which necessarily must rest largely upon the law and practice of the forum in which the lien action is brought. As a general rule, however, it may be said that the court has power to add other parties if their presence is necessary to mete out justice between all interested parties.¹ But the plaintiff cannot bring in, or the court add parties unless the plaintiff has a cause of action against the defendant or some person originally made a defendant.² Neither can a petition be so amended

⁹ *Steinmann v. Strimple*, 29 Mo. App. 478; *Foster v. Wulffing*, 20 Mo. App. 85.

¹⁰ *Wakefield v. Van Dorn*, 53 Neb. 23, 73 N. W. 226.

¹¹ *Whitmeyer v. Dart*, 29 Mo. App. 565.

¹² *Mehrle v. Dunne*, 75 Ill. 239.

¹³ *Meeks v. Sims*, 84 Ill. 422.

¹ *Snodgrass v. Holland*, 6 Colo. 596; *Williams v. Edison Electric Illuminating Co.*, 16 N. Y. Supp. 857; *Foster v. Skidmore*, 1 E. D. Smith (N. Y.) 719; *Sullivan v. Decker*, 1 E. D. Smith (N. Y.)

699. It is not fatal to a motion to add a party as defendant, that the relief asked is in the alternative. *Williams v. Edison Electric Illuminating Co.*, 16 N. Y. Supp. 857. See Dec. & Am. Dig. tit Mechanics' Liens § 264.

² *Spence v. Griswold*, 23 Abb. N. Cas. 239, 7 N. Y. Supp. 145. Where original statement did not give name of real owner, real owner could not afterwards be substituted. *Cook v. Gallatin R. Co.*, 28 Mont. 340, 72 Pac. 678.

as to bring in a new party, if the right to the lien has expired by limitation,³ or the matter has already been determined and the party is not a necessary one.⁴ Since, however, this is strictly the remedial part of the statute, parties are generally allowed to come in at any time if no one is prejudiced thereby,⁵ and this may be done even as late as the time of trial.⁶ Although the case may be one for a law court, equitable rules as to addition or substitution of parties will prevail.⁷ As long as a party may have some interest in the result of the action, he cannot be dismissed therefrom and another substituted for him.⁸ Where an action has been duly commenced and the defendant dies or becomes insane, his duly appointed representatives should be substituted for him.⁹

§ 231. **Party—Right of intervention.**—As said in the previous section, the right of intervention varies as the procedure may vary in the different courts where the action is brought.¹ Generally on the theory that all liens or rights attaching on certain property should be determined without delay and at as little expense as is consistent with justice, all parties having a lien on the property, or on the fund, or whose rights will in some way be adjudicated, are proper parties and if not made parties may on their own motion or motion of the court, or of an interested party be brought into the action the same as

³ *Rumsey, &c., Co. v. Pfeffer*, 108 Mo. App. 486, 83 S. W. 1027.

⁴ *Mulligan v. Vreeland*, 88 Hun (N. Y.) 183, 34 N. Y. Supp. 990.

⁵ *Elwell v. Morrow*, 28 Utah 278, 78 Pac. 605. The statutory provision that no delay shall be granted at the second term for the purpose of bringing in defendants not served, does not apply to mechanic's lien cases, where a dismissal would be a bar to a recovery on the lien. *Schul-*

enburg v. Werner, 6 Mo. App. 292.

⁶ *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926.

⁷ *Gress Lumber Co. v. Rogers*, 85 Ga. 587, 11 S. E. 867.

⁸ *Busse v. Voss*, 9 Ohio Dec. (Re.) 441, 13 Wkly. L. Bull. (Ohio) 542.

⁹ *Pratt v. Seavey*, 41 Me. 370, See § 227.

¹ See *Pomeroy's Rights & Remedies*, 2d Ed., § 411.

if they were original parties to the suit.² A lienor must claim his right within the proper time limit. If he fails so to do he loses his claim but if his interest was such that he ought to have been made a party in order to protect his rights he can intervene or otherwise be brought into the action.³ Under the practice of some courts, subsequent incumbrancers may have their rights disposed of without being made parties to the action.⁴ While a subsequent mortgagee may have no absolute right to intervene,⁵ yet if application is made at the proper time, he will be allowed to do so.⁶ All persons claim-

² *Kling v. Railway Const. Co.*, 4 Mo. App. 574; *Chamberlain v. O'Connor*, 1 E. D. Smith (N. Y.) 665; *Noyes v. Fritz*, 2 Miles (Pa.) 162; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389. Come in on distribution. *DeGive v. Meador*, 51 Ga. 160. Must come in before trial. *Wilson v. Merryman*, 48 Md. 328. Not allowed on money demand, unless plaintiff consents. *Cook v. Gallatin R. Co.*, 28 Mont. 340, 72 Pac. 678. Present owner of property. *Shannon v. McDuffee*, 2 Pa. Dist. 230. One who cannot show title to the realty to be in himself will not be made a party defendant. *Pace v. Yost*, 10 Kulp (Pa.) 538. A party merely interested in the proceeds of the sale of the property has no standing to intervene prior to judgment. *Watts v. Eckles*, 11 Pa. Dist. 570. A beneficiary in a trust deed, or one who, after commencement of action to foreclose a mechanic's lien, buys the property under the trust deed, having a right, under Gen. St. Col. § 2161, and Code Civ. Proc. Colo. § 22, to intervene and

interpose any legal defense, by failing to do so, knowing of the action, waives his right to be a party. *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912.

Contractor.—"The purpose to be served by making the contractor a party, is that he may defend at his own expense, and the statute (Section 5122), provides that, if he fails to make such defense, the owner may make it for him. For this purpose the contractor may be brought into the action at any time on the application of either party, provided the action is properly brought against the owner of the premises within the year." *Western Sash & Door Co. v. Helman*, 65 Kan. 5, 68 Pac. 1080.

³ *Kelley v. Gilbert*, 78 Md. 431, 28 Atl. 274.

⁴ *Robock v. Peters*, 13 Manitoba 124.

⁵ *Van Winkle v. Stow*, 23 Cal. 457.

⁶ *Colorado.*—*Bitter v. Mouat Lumber & Inv. Co.*, 10 Colo. App. 307, 51 Pac. 519.

ing mechanics' liens sustain such a peculiar relation to the property sought to be foreclosed in such an action by reason of their labor and materials going into and forming a part of the property, that it may be said that they always should be made parties, and if not made parties in the original petition, they should be allowed to come in afterward and present their claims.⁷

§ 232. **Process—Summons.**—Process is the method employed by law to bring a party into court.¹ A defendant is usually brought into court by service of summons. If he is personally within the jurisdiction of the court, it is made upon him in person; if he is not within the jurisdiction then it is constructively made by publication. In either case it must be made in the manner the statute provides or it is ineffective and the court has no jurisdiction or power to make any order that will bind the defendant or his property.² The

Kansas.—*Erving v. Phelps, &c.*, Windmill Co., 52 Kan. 787, 35 Pac. 800.

Maryland.—*Carson v. White*, 6 Gill. (Md.) 17.

New York.—*Brewster v. McLaughlin*, 28 Misc. (N. Y.) 50, 58 N. Y. Supp. 989.

Tennessee.—*Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136. Must not be so late as to defer judgment. *Hocker v. Kelley*, 14 Cal. 164. His failure to intervene in the first suit, of which he had knowledge, does not estop him from maintaining the action. *Wakefield v. Van Dorn*, 53 Neb. 23, 73 N. W. 226.

⁷ *Johnson v. Keeler*, 46 Kan. 304, 26 Pac. 728; *Dewing v. Congregational Society*, 13 Gray (Mass.) 414. Statute brought them in. *Hunter v. Truckee*

Lodge, 14 Nev. 24. Subcontractor. *Pool v. Sanford*, 52 Tex. 621.

¹ 1 Bouv. Dict. tit. Process. See Dec. & Am. Dig. tit. Mechanics' Liens § 264.

² **Iowa.**—*Kitsmiller v. Kitchen*, 24 Iowa 163; *Jones, &c., Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678.

Missouri.—*McKelvey v. Wonderly*, 26 Mo. App. 631.

New York.—*Tinker v. Geraghty*, 1 E. D. Smith (N. Y.) 687; *McSorley v. Hogan*, 1 Code Rep. (N. Y.) 285. But if the proceedings are strictly in rem, notice actual or constructive, is essential to the validity of the judgment against all the world. Constructive notice is an essential to the validity of a judgment in rem, as actual notice is to that of a judgment in personam; a proceeding

mere fact that the defendant is referred to in the petition will not be sufficient. Summons must be issued for him and served as the law provides.³ If the service of summons should be defective and the party answers he waives such defect and brings himself within the jurisdiction of the court.⁴ In no sense is a person properly a party until he is served with summons.⁵ Until he is so served the action is not "pending." A corporation must be designated and served as such.⁶ If the action is against the property of an insolvent owner and the action is against the assignee without designation of his office it will be held that he is merely made a party as an individual.⁷ Vendor and purchaser in an executory contract are held under some code proceedings to be so united in interest, that service on one will bind both, so far as the foreclosure of a lien is concerned.⁸ While a court will not let technicalities defeat the law, yet in matters of the issue of process and the service of summons the statute must be followed.⁹ However, the mere fact that the suit is referred to in the summons as on the chancery side of the court, when it is on the law side, is a technicality that will not be allowed to defeat the

professing to determine the right of property without notice actual or constructive, is a mere arbitrary edict, not to be regarded anywhere as the judgment of a court. *McKim v. Mason*, 3 Md. Ch. 186.

³ *Clayton v. Farrar Lumber Co.*, 119 Ga. 37, 45 S. E. 723.

⁴ *Oliver v. Fowler*, 22 S. Car. 534.

⁵ *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991.

⁶ *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N. Y. Supp. 326.

⁷ *Quinby v. Slipper*, 7 Wash.

475, 35 Pac. 116, 38 Am. St. 899.

⁸ *Moore v. McLaughlin*, 11 App. Div. (N. Y.) 477, 42 N. Y. Supp. 356.

⁹ *McDonnell v. Nicholson*, 67 Mo. App. 408. "It is, and has been, the policy of our law to protect and enforce this lien of mechanics and furnishers and not to allow them to be defeated by any technical niceties of construction. *Burr v. Graves*, 4 Lea. 552; *Cole Mfg. Co. v. Falls*, 90 Tenn. (6 Pick.) 466. At the same time it cannot be held that the lien will be protected when there is an entire want of diligence and care to ascertain the true state of the

action.¹⁰ Where a defendant sets up the matter in a cross-complaint, and seeks affirmative relief against the plaintiff or co-defendant, summons must issue against him, and the co-defendant or plaintiff must be brought into court in the same manner as the original defendant,¹¹ and in general, service must be had on the real party in interest.¹² The residence of the owner will give jurisdiction for the service of process on him, if the property is in the same county and in some cases summons may be issued to contractors and others living in adjoining counties.¹³

§ 233. **Personal and constructive service.**—As a rule the statutes do not allow a personal judgment to be rendered unless there is personal service,¹ and the pleadings should disclose the kind of an action, so that there can be gathered therefrom, the kind of service to be made.² Even where the

title to the prejudice of the real owner." *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136.

¹⁰ *Reed v. Boyd*, 84 Ill. 66.

¹¹ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹² *Trustee in bankruptcy.*—Under Gen. Laws, R. I., 1896, c. 206, § 10, providing that a citation in proceedings to enforce a mechanic's lien shall issue to the owner of the property, and to each and every person having a mortgage, attachment, or any other conveyance thereof, or of any part thereof, on record, a trustee in bankruptcy of the original owner, appointed after the lien has attached, should be treated as the owner; and service on him was sufficient, without service on the bankrupt. *Hawkins v. Boyden*, 25 R. I. 181, 55

Atl. 324; *Johnson v. Frazee*, 20 S. Car. 500.

¹³ *Mathews v. Heisler*, 58 Mo. App. 145.

¹ *Colcord v. Funck*, 1 Morris (Iowa) 178; *Seiglestyle v. Diesendoroth*, 12 Bush. (Ky.) 296; *Kelsey v. Rourke*, 50 How. Pr. (N. Y.) 315.

² *Christian v. O'Neal*, 46 Miss. 669; *Chapman v. Bolton Steel Co.*, 2 Ohio Cir. Dec. 523; *Davis v. John Mouat Lumber Co.*, 2 Colo. App. 381, 31 Pac. 187; *McCann v. Gerding*, 27 Misc. (N. Y.) 845, 59 N. Y. Supp. 381. In a suit to foreclose a mechanic's lien, the objection that "the affidavit does not show a legal service of the papers" sufficiently raises the question whether the notice of lien was properly served. *Hannah, &c., Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120.

statute permits a judgment in personam,³ and service by publication, such service cannot be had if the person is within the state and it is possible to make personal service.⁴ As a general rule it must be shown that personal service cannot be made before service by publication can be had.⁵ A proceeding to foreclose a mechanic's lien being generally regarded as a proceeding in rem, service by publication is sufficient if made in the manner the statute provides.⁶ A defective publication can only be remedied by a new and correct one.⁷ And where service may be so made by publication, the court may make such order as will secure the mechanic's claim and the application of money accruing from the sale of the premises.⁸ Where service is made by publication, proof must be produced in court that it has been made as the statute requires.⁹ On the question as to what is meant by certain expressions in the statute as to the time in which service should be made the reader is referred to the footnote for a collection of a variety of holdings.¹⁰

³ Gould v. Garrison, 48 Ill. 258.

⁴ Falconer v. Frazier, 7 Sm. & M. (Miss.) 235.

⁵ Falconer v. Frazier, 7 Sm. & M. (Miss.) 235; Bernhardt v. Brown, 118 N. Car. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

⁶ Genest v. Las Vegas Masonic Bldg. Assn, 11 N. Mex. 251, 67 Pac. 743.

⁷ Vickerle v. Spencer, 9 R. I. 585.

⁸ Simonson Bros. Mfg. Co. v. Citizens' State Bank, 105 Iowa 264, 74 N. W. 905.

⁹ Decker v. Myles, 4 Colo. 558.

¹⁰ Under a statute which requires that the plaintiff shall cause notice to be published at least once a week for three consecutive weeks in some newspaper

published in the county, it was held that if it was published three times in three consecutive weeks in a weekly newspaper, although less than 21 days intervened between the days of the first publication and the time when the publication was complete, it was sufficient. Decker v. Myles, 4 Colo. 558. Under a statute requiring publication for three successive weeks it was held that while the language admitted of two constructions, the court was inclined to adopt that which required three full weeks to intervene between the date of the first publication and the time named. Shipley v. Mitchell, 7 Blackf. (Ind.) 472. Under a statute that required a notice to be given

§ 234. **Process—Miscellaneous matters.**—Under some statutes it is required that indorsements must be made on the claim or writ, and where this is required the service is defective if the indorsements are not made,¹ but if the indorse-

three weeks before the time of meeting, it was held that three full weeks was necessary. In re North Whitehall Township, 47 Pa. St. 156. And where the notice is required to be published weekly for one month, the full calendar month was intended to be and must be covered by the period of publication. Mitchell v. Woodson, 37 Miss. 573. Under a statute requiring publication in some newspaper once in each week for at least twelve successive weeks, the court held that 84 days full period of twelve weeks must intervene between the first publication and the day of sale. Early v. Doe, 16 How. (U. S.) 610, 14 L. ed. 1079. In another case, a sale was held valid where made under a decree which required notice of the sale to be advertised in a certain newspaper for three weeks successively, although less than twenty-one days intervened between the date of the first publication and the date of sale. Garrett v. Moss, 20 Ill. 549. And where the statute required notice to be published for three successive weeks, a notice was held valid which was published once each week for three successive weeks. Pearson v. Bradley, 48 Ill. 250. In another case where the notice was to be pub-

lished for three times for three successive weeks, it was held sufficient if three publications were made in three successive weeks. Andrews v. The People, 84 Ill. 34. In another state the statute required publication for three weeks successively, publications were made on the 15th, 22d, and 29th days of the month and the sale was advertised for the 30th in the same month, and although but 15 days intervened between the first publication and the day of sale, it was held that the statute was complied with. Swett v. Sprague, 55 Me. 190. In New York it is sufficient to publish a copy of the notice in six successive numbers of a weekly newspaper, although the first publication may be less than six weeks prior to the sale. Olcott v. Robinson, 21 N. Y. 150, 78 Am. Dec. 126. And under a statute that required publication for three weeks immediately previous to the time of sale, at least twice in each week publication was sufficient although three full weeks had not intervened. Chamberlain v. Dempsey, 22 How. Pr. (N. Y.) 357; Wood v. Morehouse, 45 N. Y. 368.

¹ Hall v. Spaulding, 40 N. J. L. 166; Currier v. Cummings, 40 N. J. Eq. 145, 3 Atl. 174; Cox v. Flanagan (N. J. Eq.), 2 Atl. 33.

ments are immaterial they may be waived.² In some jurisdictions the lien is enforceable by way of attachment upon the property upon which it is sought to fasten the lien. Under such statutes, the law relating to service must be strictly followed.³ Unless the defendant is served in the manner provided the attachment is a nullity.⁴ In states where the distinction between law and equity procedure is recognized, the proceedings must be transferred from the law to the equity side of the court.⁵ Generally it is not necessary to bring an attachment to get jurisdiction of the property, since it is a proceeding in rem, and where process is had, the property is seized by the court.⁶ In some states the lien is

² *James v. Van Horn Co.*, 10 Vroom (N. J. L.) 353. In an action for a mechanic's lien, it is not necessary that the summons should state that judgment will be taken for a lien. *Willamette Falls Transportation & Milling Co. v. Riley*, 1 Ore. 183.

³ *Summerlin v. Thompson*, 31 Fla. 369, 12 So. 667; *Brown v. Brown*, 34 Tenn. 431; *Barnes v. Thompson*, 32 Tenn. 313; *Warner v. A. H. Yates & Co.*, 118 Tenn. 548, 102 S. W. 92. It must allege all the facts that will constitute a lien. *Stearns v. Jaudon*, 27 Fla. 469, 18 So. 640. In an action to enforce a mechanic's lien for materials furnished in the construction of a building, the attachment must be made, under Pub. Laws, 1897, p. 251, c. 232, § 1, within 90 days after the materials are furnished. *Oakland Mfg. Co. v. Lemieux*, 98 Me. 488, 57 Atl. 795. Under Mill. & V. Tenn. Code, § 2747, providing that mechanics' liens shall be enforced by attachment either in law or

equity, or by judgment and execution at law, to be levied on the property on which the lien is, an attachment must issue and be levied upon the property in order to preserve or enforce such lien. *Dollman v. Collier*, 92 Tenn. 660, 22 S. W. 741. Not proper remedy. *Aiken v. Kennedy*, 1 White & W. Civ. Cas. Ct. App. (Tex.) 1321.

⁴ As to recitals required. *Hillman v. Anthony*, 63 Tenn. 444; *Shelby v. Hicks*, 37 Tenn. 197; *Brown v. Brown*, 34 Tenn. 431; *McLeod v. Capell*, 66 Tenn. 196. Order must be made by the court. Cannot be commenced by affidavit. *DeSoto Lumber Co. v. Loeb*, 110 Tenn. 251, 75 S. W. 1043.

⁵ *Hillman v. Anthony*, 63 Tenn. 444.

⁶ *Bernhardt v. Brown*, 118 N. Car. 700, 24 S. E. 527, 715, 36 L. R. A. 402. Procedure according to general laws. *Strong v. Lake Weir Chautauqua & Lyceum Assn.*, 25 Fla. 765, 6 So. 882. *Salt Lake Lithographing Co. v. Ihex Mine & Smelting Co.*, 15 Utah 440, 49 Pac.

enforced by the old common law writ of scire facias.⁷ In these jurisdictions the original must set forth all the facts which permit the issuance of the writ,⁸ or the writ will be subject to a motion to quash.⁹ Under this writ the proceeding is called a proceeding in rem,¹⁰ and generally the same particularity is required as in foreclosure proceedings.¹¹ In some few states the statutes require a lien claimant to file a notice lis pendens. Where this is required the claimant must follow the provision if he would get the benefit of the statute.¹²

768. Sundays are included in the 90 days in which to make an attachment to enforce a mechanic's lien, under Pub. Laws Me. 1897, p. 251, c. 232, § 1. *Oakland Mfg. Co. v. Lemieux*, 98 Me. 488, 57 Atl. 795.

⁷ *Morgan v. Bloecker*, 6 Pa. Dist. R. 659, 41 W. N. C. 127. The proceeding by scire facias to enforce a mechanic's lien is not taken away by the new Code. *Doellner v. Rogers*, 16 Mo. 340. A scire facias is a judicial writ used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. In the present case, the bill of particulars of the plaintiff's claim is filed of record under the statute which gives this remedy, and it is recited in the writ and thereby made part of it, so that any further pleading on his part, to set forth the nature of his de-

mand, would be wholly superfluous. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 14 L. Ed. 487.

⁸ *Carswell v. Patzowski*, 3 Penne. (Del.) 573, 53 Atl. 54; *Conley v. Zweighaft*, 7 Pa. Dist. 87; *Gordon v. Norton*, 5 Lack. Leg. N. 381, 23 Pa. Co. Ct. R. 158, 9 Pa. Dist. 29; *East Stroudsburg Lumber Co. v. Ottenheimer*, 4 Pa. Dist. R. 730. Amount claimed must be stated. Officer must retain what he has done. *Plummer v. Eckenrode*, 50 Md. 225. Incorrect return. *Donahoo v. Scott*, 12 Pa. 45.

⁹ *Wilson v. Merryman*, 48 Md. 328. Can not be maintained on claim apportioned among several buildings. *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257.

¹⁰ *Anshutz v. McClelland*, 5 Watts (Pa.) 487.

¹¹ *Smith v. Klinger*, 9 Pa. Co. Ct. 301.

¹² *Rockwood v. Walcott*, 85 Mass. 458; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Bowes v. New York Christian Home*, 64 How. Pr. (N. Y.) 509. The order of notice on a petition filed in vacation, to enforce a mechanic's lien, need not be made returnable

§ 235. **Pleading—Declaration—Petition—Form.**—The general rules of pleading applicable in the particular jurisdiction govern in the action for the foreclosure of mechanics' liens. The first pleading is variously termed the Petition, the Bill, the Complaint or the Declaration. Whatever the designation the one essential is that it must show that the person bringing the action has performed all of the conditions required by the statute creating a lien. Generally there is no rule of pleading applicable only to mechanics' liens.¹ As a rule, a complaint or petition that sufficiently describes the property, fixes the time and manner of labor, the amount due, and that the lien was filed within the statutory time, and contains also the necessary averments in ordinary suits in equity, is sufficient.² The petition must show that plaintiff's claim is within the law, and that it has been perfected as the law provides and that the lien

at the next term. *Worthen v. Cleaveland*, 129 Mass. 570. The omission to file a notice of lis pendens in an action to enforce a mechanic's lien cannot be raised for the first time as an objection to the rendition of judgment. *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267. Any party on whom the notice is served may make the objection, if he has not waived it by a general appearance. *Otis v. Voorhis*, 49 How. Pr. (N. Y.) 273.

¹ *Benner v. Schmidt*, 44 Ill. App. 304; *Jorgensen Co. v. Sheldon*, 2 Alaska, 607. See § 101. See Dec. & Am. Dig. tit. Mechanic's Lien § 269.

² *Idaho*.—*Robertson v. Moore*, 10 Idaho 115, 77 Pac. 218.

Indiana.—*Price v. Jennings*, 62 Ind. 111; *Montpelier Light & Water Co. v. Stephenson*, 22 Ind. App. 175, 53 N. E. 444.

Missouri.—*Bickel v. Gray*, 81 Mo. App. 653.

Nebraska.—*Hersh & Son v. Carman*, 51 Neb. 784, 71 N. W. 713.

Oregon.—*Watson v. Noonday Min. Co.*, 37 Ore. 287, 60 Pac. 994.

Wisconsin.—*Dewey v. Fifield*, 2 Wis. 55.

New York.—*Clarke v. Heylman*, 80 App. Div. (N. Y.) 572, 80 N. Y. Supp. 794. A complaint alleging that defendant A., by contract with defendants C. and L., furnished the materials and erected a building on the land of C. and L. herein described, and bought of plaintiffs' assignor window frames, stairs, doors, inside furnishing material, lumber etc., of the agreed value of \$2,695, which went into the construction of said building, is sufficient. *Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285. The rules of pleading prescribed by the statute relating to

may be foreclosed as the law requires.³ It must show the performance of all the conditions precedent to the establishment

mechanic's liens do not apply to cases which as set out in the declaration are not within the statute. *Coddington v. Beebe*, 29 N. J. L. 550.

Against Purchasers.—A bill for the foreclosure of a mechanic's lien alleging that a purchaser of the property agreed in writing to pay the claim, but containing no allegation showing to whom the promise was made, or as to any consideration therefor, will not support a personal judgment against the purchaser. *Miller v. Schaefer*, 75 Ill. App. 389.

Form of Petition.—Plaintiffs say that about the month of A. D. 1858, Squire Worrell employed plaintiffs to build a dwelling-house in the town of Waterloo, in Clarke County, Mo., which is situated on lot No. 200, in Block No. 23, in said town mentioned aforesaid.

Plaintiffs further state, that they (plaintiffs) completed said house on or before the 19th day of December, 1858, according to the contract, with said Worrell. Plaintiffs further state, that the said Worrell was to furnish all the materials for building said house, and plaintiffs were to do all the carpenter's work upon said house for the sum of \$76, which amount was to be paid as soon as the carpenter work was completed. Plaintiffs further state, that on or before the first of January, 1859, the said Worrell sold said house to Isaac Fields.

Plaintiffs further state, that said Fields purchased from the said Worrell as aforesaid, and that on or about the day of January 1859, the said Fields took a mortgage upon the property of Worrell for the purpose of securing himself in the event that plaintiffs should file their lien upon said house. Plaintiffs further state, that they (plaintiffs) filed their mechanic's lien upon the said house mentioned aforesaid on the 8th day of February 1859, for the amount that was due plaintiffs, which was \$62.

Plaintiffs further state that the mortgage mentioned aforesaid will appear of record in the Recorder's Office, and that the lien mentioned aforesaid is not filed in said office. Plaintiffs further ask a judgment for the amount of said lien, which is \$62, and interest from the filing thereof and for general relief. *Briggs v. Worrell*, 33 Mo. 157. A bill in equity to enforce a mechanic's lien must allege every fact essential to the right to such lien with accuracy and clearness, so that issue may be taken thereon; and a mere allegation that complainant has filed a statement and is entitled to such a lien is sufficient. *Canton Roll & Machine Co. v. Rolling Mill Co.*, 155 Fed. 321.

³ *Hingert v. American Trust & Sav. Bk.*, 100 Ill. App. 85; *Hunter v. Cordon*, 32 Ore. 443, 52 Pac.

of a cause of action.^{3a} The facts that properly come into existence after the filing of a petition need not be averred therein.⁴ It is especially necessary that the declaration or petition should show on its face that all the statutory requirements essential to the creation of a lien have been satisfied.⁵ The mere reference to the filed lien will not be sufficient.⁶ Nor is a defect in a petition cured by filing a copy of the statement.⁷ A reference to an account attached as an exhibit, showing what materials have been furnished, is sufficient.⁸ Likewise any material matter therein may be referred to and made a part of the petition.⁹

§ 236. Pleading—Petition—Allegations of.—While the different steps necessary to create a lien should be set forth, yet they do not constitute separate causes of action requiring separate statement and numbering.¹ A petition is not rendered

182; *Rhodes v. Jones*, 26 Tex. Civ. App. 568, 64 S. W. 699.

^{3a} *Shields v. Sorg*, 129 Ill. App. 266, judgment affirmed, *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181.

⁴ *Gaas v. Souther*, 167 N. Y. 604, 60 N. E. 1111, also 46 App. Div. (N. Y.) 256, 61 N. Y. Supp. 305.

⁵ *Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812; *Watkins v. Shaw*, 7 Ohio Cir. Ct. 415; *Wagenhorst v. Wessner*, 1 Woodw. Dec. (Pa.) 151; *Smith v. Wilkins*, 31 Ore. 421, 48 Pac. 708. Certificate of architect where contract so provides. *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

⁶ *Fay v. Adams*, 8 Mo. App. 566; *Central City Brick Co. v. Norfolk &c.*, R. Co. 44 W. Va. 286, 28 S. E. 926.

Need Not Plead What is of no Benefit.—That a certificate of

lien made a part of the complaint in foreclosure of a mechanic's lien failed to state that a copy of the lien notice was returned to the lienor cannot affect his right to a lien, the return of the copy not being a matter which he was bound to plead. *Waterbury Lumber & Coal Co. v. Coogan*, 73 Conn. 519, 48 Atl. 204.

⁷ *Newport &c., Lumber Co. v. Lichtenfeldt*, 24 Ky. L. Rep. 1969, 72 S. W. 778.

⁸ *Parker Land & Improvement Co. v. Reddick*, 18 Ind. App. 616 47 N. E. 848; *Bricker v. Gresham*, 1 Mo. App. Rep'r., 421.

⁹ *Jones v. Shaw*, 53 Mo. 68, *Matthiesen v. Arata*, 32 Ore. 342, 50 Pac. 1015; *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341.

¹ *Hardy v. Miller*, 11 Neb. 395, 9 N. W. 475. See Dec. & Am. Dig. tit. Mechanic's Lien § 271.

multifarious by reason of asking a personal judgment and also a foreclosure of the lien.² Immaterial defects or material ones where no one is injured will not defeat the cause of action.³ Other necessary facts being alleged, it is not necessary to allege the capacity in which the plaintiff sues, whether as contractor or subcontractor.⁴ However, a petition is defective which alleges or shows services for some things subject to a lien and some things not subject to a lien, intermingled as one cause of action.⁵ Some courts have held, however, that objections on this ground must be made before trial,⁶ and that the items must be so blended as to be inseparable.⁷ A petition is not defective merely because it does not allege that the money is due, if it shows that the contract was performed; the law will presume that the money was due upon the completion of the contract.⁸ Facts of which the court takes judicial notice need

² *West v. Grainger*, 46 Fla. 257, 35 So. 91; *Kasper v. St. Louis Terminal Ry. Co.* 101 Mo. App. 323, 74 S. W. 145; *Freese v. Avery*, 57 App. Div. (N. Y.) 633, 69 N. Y. Supp. 150; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

³ *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363; *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 583, 73 S. W. 137. Where a petition for a mechanic's lien used the word "south" in describing the property, instead of the word "north" and it was evident from the context that such use of the word "south" was a mistake, such mistake did not vitiate the lien. *Sawyer-Austin Lumber Co. v. Clark*, 82 Mo. App. 225. An answer setting up a mechanic's lien, but omitting to state the names of the owners of the property at

the time the improvement was made, is not fatally defective, if the lien notices attached to the answer contain the names of such owners. *Title Guarantee & Trust Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271.

⁴ *Salem v. Lane*, 189 Ill. 593, 60 N. E. 37; *Reilly v. Poerschke*, 19 Misc. (N. Y.) 612, 44 N. Y. Supp. 422.

⁵ *Murphy v. Gulsti*, 22 R. I. 588, 48 Atl. 944.

⁶ *Perkins v. Wilson*, 1 Marv. (Del.) 196, 40 Atl. 950. Defendant in a mechanic's lien case, having pleaded the general issue, waives defects in the lien claim. *General Fire-Extinguisher Co. v. Magee Carpet Works*, 199 Pa. 647, 49 Atl. 366.

⁷ *Perkins v. Wilson*, 1 Marv. (Del.) 196, 40 Atl. 950.

⁸ *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363.

not be averred.⁹ And the petition is good on demurrer if it states facts sufficient for either a personal judgment or foreclosure of the lien.¹⁰ Unless the statute otherwise provides, the general allegation of a contract, without giving its details, is sufficient.¹¹ A previous demand for payment is not generally necessary,¹² and a petition is good on demurrer if some of the items are within the statutory period.¹³ Where matters are properly before a court it is sufficient if cross-claimants ask that their claims be adjusted.¹⁴ A liberal rule as to amendments is usually applied.¹⁵ It is not generally necessary to allege that the materials were purchased for the structure upon which the lien is claimed. It is sufficient if this fact be shown on trial.¹⁶ Where the assignment of a debt carries with it the right to perfect the lien, the complaint need not aver in terms an assignment of the right to file the liens.¹⁷ Under the practice in some jurisdictions an allegation that a husband and wife are owners of the land without alleging that they are parties to

⁹ *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363.

¹⁰ *Advance Mfg. Co. v. Auch*, 25 Ind. App. 687, 58 N. E. 1062; *Mathiasen v. Shannon*, 25 Misc. Rep. (N. Y.) 274, 54 N. Y. Supp. 305; *Childress v. Smith*, 90 Tex. 610, 37 S. W. 1076. Against executor. *San Francisco Pav. Co. v. Fairfield*, 134 Cal. 220, 66 Pac. 255. A joint general demurrer to a complaint for insufficiency on behalf of several defendants is bad, if the complaint states a cause of action against any one of them. *Mark Paine Lumber Co. v. Douglas County Imp. Co.*, 94 Wis. 322, 68 N. W. 1013.

¹¹ *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Bringinghurst v. Mutual Building & Loan Ass'n.*,

19 Tex. Civ. App. 355, 47 S. W. 831.

¹² *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283.

¹³ *Indiana Mut. Building & Loan Ass'n. v. Paxton*, 18 Ind. App. 304, 47 N. E. 1082.

¹⁴ *Rialto Mining & Milling Co. v. Lowell*, 23 Colo. 253, 47 Pac. 263; *Freese v. Avery*, 57 App. Div. (N. Y.) 633, 69 N. Y. Supp. 150; *Lignoski v. Crooker*, (Tex. Civ. App.) 22 S. W. 774.

¹⁵ *James v. Van Horn*, 10 Vroom (N. J. L.) 353.

¹⁶ *Dougherty v. Loebelenz*, 9 Pa. Super. Ct. 344, 43 W. N. C. 447.

¹⁷ *Eagle Gold-Min. Co. v. Bryarly*, 28 Colo. 262, 65 Pac. 52.

the contract, will not support a judgment against the wife.¹⁸ But it will be good against the person alleged to have entered into the contract.¹⁹

§ 237. **Petition—Prayer for relief and description of property.**—It is generally not necessary that the petition contain a specific prayer for a lien.¹ But the petition should set forth the facts which will authorize the court to decree a lien on the premises sought to be held for the lien, and it would be very proper to insert a prayer for the relief desired.² Likewise the petition should be so framed that it will plainly show the nature, purpose and object of the suit.³ Where the distinctions between law and equity are retained, even though the distinction as to forms has been abolished, it is held that a petition which is not sufficient to decree a lien upon, although brought as in equity proceedings, will not be sufficient to allow a personal judgment where if it had been filed in a law court, such judgment might have been had.⁴ Of course the petition must describe the property upon which it is sought to have a lien foreclosed and it is generally held that the same certainty of description is demanded that is required in a levy under an execution.⁵ Where the amount of land that may be held under

¹⁸ *Georges v. Kessler*, 131 Cal. 183, 63 Pac. 466.

¹⁹ *Georges v. Kessler*, 131 Cal. 183, 63 Pac. 466.

¹ *McCarty v. Van Etten*, 4 Minn. 461; *Johnson v. McHenry*, 27 Mo. 264; *Cornell v. Matthews*, 27 N. J. L. 522. Where the petition in a suit to recover for lumber and material furnished, and to enforce a lien therefor, alleges the facts constituting the lien, and prays a foreclosure thereof, and the registered affidavit attached to the petition states that it is filed to "fix and secure" plaintiff's

lien, the lien is sufficiently asserted. *Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338.

² *Mason v. Heyward*, 5 Minn. 74; *Foster v. Poillon*, 2 E. D. Smith (N. Y.) 556, 1 Abb. Pr. (N. Y.) 321.

³ *Foster v. Poillon*, 2 E. D. Smith, (N. Y.) 556, 1 Abb. Pr. (N. Y.) 321.

⁴ *Ming Yue v. Coos Bay, R. & E. R. & Nav. Co.*, 24 Ore. 392, 33 Pac. 641.

⁵ *Alabama.—Montgomery Iron Works v. Dorman*, 78 Ala. 218;

the lien is an issuable fact, then the averments of the petition must show how much of the tract is claimed to be subject to the lien.⁶ However, if all of the tract of land that is subject to a lien is not described in the complaint and the building itself covered all, a decree for the entire tract may be had.⁷ As a general rule, however, only the part of the land described in the petition can be held and decreed to be subject to the lien.⁸ If more should be described than can be held for the lien, the petition is not defective. The court, however, can only decree a

Illinois.—Turney v. Saunders, 5 Ill. 527.

Iowa.—O'Halloran v. Sullivan, 1 G. Greene, (Iowa) 75.

Minnesota.—McCarty v. Van Etten, 4 Minn. 461; Knox v. Starks, 4 Minn. 20.

Missouri.—Sawyer-Austin Lumber Co. v. Clark, 172 Mo. 588, 73 S. W. 137.

New York.—Duffy v. Brady, 4 Abb. Pr. (N. Y.) 432.

Wisconsin.—Brown v. La Crosse City Gaslight &c., Co., 16 Wis. 578; Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74. Sufficient descriptions, see Lombard v. Johnson, 76 Ill. 599. Insufficient descriptions, see Crawfordsville v. Barr, 65 Ind. 367. A petition to enforce a mechanic's lien will be dismissed where the description is defective, and insufficient to identify the premises. Williams v. Porter, 51 Mo. 441. Giving the wrong house number, if the lot is correctly described, will not affect the lien. Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571.

⁶ Willamette Steam Mills Co. v. Kremer, 94 Cal. 205, 29 Pac.

633; McCarty v. Van Etten, 4 Minn. 461. A description of the property as a large building on certain lots in a certain block, together with a convenient space of land around the same, is sufficient. Dickson v. Corbett, 11 Nev. 277.

Lot in City.—Under Hill's Code, 3676, giving a mechanic's lien on "any lot in any incorporated city or town" for grading, filling in, or otherwise improving the same, "or the street in front of or adjoining the same," the word "lot" must be confined to property so situated as to have impressed on it the character of "urban," as distinguished from "rural," use, and a complaint to enforce a lien is not sufficient which describes the property improved as a "tract of 10 acres in an incorporated city," Pilz v. Killingsworth, 20 Ore. 432, 26 Pac. 305.

⁷ Smith v. Johnson, 2 MacArthur, (D. C.) 481.

⁸ Snow v. Council, 65 Ga. 123; Big Blackfoot Milling Co. v. Blue Bird Min. Co. 19 Mont. 454, 48 Pac. 778.

sale of so much thereof as is properly subject to the lien.⁹ And it has been held sufficient if the premises upon which the lien is sought to be foreclosed is described in an exhibit, attached to and made a part of the petition.¹⁰ It is sometimes held sufficient if the land is so described that it can be identified by extrinsic evidence.¹¹

§ 238. Petition—Averment of ownership and description of improvements.—The petition should set out the interests of the various parties in the premises sought to be foreclosed, and if enough appears to disclose the rights of the parties, the court will adjust such rights.¹ The averments must be such that they will show that the party making the contract had such ownership in the premises as rendered it subject to a lien un-

⁹ *Busfield v. Wheeler*, 14 Allen (Mass.) 139; *Lyon v. Logan*, 68 Tex. 521, 5 S. W. 72, 2 Am. St. 511.

¹⁰ *Matthews v. Monts*, 61 S. C. 385, 39 S. E. 575; *Richlands Flint-Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806. Reference to contract. *Murphy v. Guisti*, 22 R. I. 588, 48 Atl. 944.

¹¹ *O'Halloran v. Sullivan*, 1 G. Greene, (Iowa) 75. In a petition for a mechanic's lien, the land was described as being about three acres, lying in the southeast corner of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 22, in Township 15 N., range 10 W. of third P. M., and the petition further stated that the defendant "is now owning and in possession of said land, and he has been ever since the time above mentioned, and in his own right is now holding, and has been so holding from," etc., "under a title bond or a bond for a deed, to and for said land, in writing

made and given by William B. Warren." Held, that as circumstances were referred to, by which, with the aid of extrinsic evidence, the premises could be precisely located, the description was sufficient. *Quackenbush v. Carson*, 21 Ill. 99; *Seely v. Neill*, 37 Colo. 198, 86 Pac. 334; *Salter v. Goldberg*, (Ala.) 43 So. 571.

¹ *Illinois*.—*Henderson v. Connolly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490.

Missouri.—*McDermott v. Class*, 104 Mo. 14, 15 S. W. 995; *Cole v. Barron*, 8 Mo. App. 509. Exhibit showed ownership. *Matthews v. Monts*, 61 S. Car. 385, 39 S. E. 575.

Wisconsin.—*Shaw v. Allen*, 24 Wis. 563. Allegation of ownership in general terms. *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546. Averments not sufficient to show contract. *McNicholas v. Tinsler*, 127 Ill. App. 381.

der the statute.² If an answer were filed admitting ownership a defective averment in this respect would be waived.³ But an allegation that certain parties other than the owner have or claim to have some interest in the premises is not an admission that they had any interest.⁴ So it has been held that an allegation that a certain person claims an interest in the premises and a prayer that he be compelled to set up the same or be barred, will not be sufficient to bar his claim, unless there is a further allegation that the plaintiff's claim is superior to the claim of such person.⁵ An averment that a person holds the property by an unrecorded title bond, fraudulently taken in the name of his wife, but paid for by him, is a sufficient allegation of ownership.⁶ If only a personal judgment is desired, then as a matter of course the averment of ownership

² **Indiana.**—Adams v. Buhler, 116 Ind. 100, 18 N. E. 269.

Massachusetts.—Simpson v. Dalrymple, 11 Cush. (Mass.) 308.

Michigan.—Knapp Electrical Works v. Mecosta Electric Co., 110 Mich. 547, 68 N. W. 245; Clark v. Raymond, 27 Mich. 456;

Minnesota.—Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016.

Missouri.—Porter v. Tooke, 35 Mo. 107. An allegation that defendant is the owner of certain "premises" sufficiently alleges the ownership of the buildings thereon. Stone v. Taylor, 72 Mo. App. 482. Defective. Big Blackfoot Milling Co. v. Blue Bird Min. Co., 19 Mont. 454, 48 Pac. 778. A petition which alleges that plaintiffs agreed to furnish defendants with the labor and material necessary to the construction of a building "on the property of defendants," describing it, suffi-

ciently alleges that defendants are the owners of the property described. Lignoski v. Crooker, (Tex. Civ. App.) 22 S. W. 774. Allegations so as to charge separate property of wife. Willard v. Magoon, 30 Mich. 273.

³ Boude v. Methodist Episcopal Church, 47 Iowa, 705; Lyon v. Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. 511.

⁴ Orr & Co. Hardware Co. v. Needham Co., 51 Ill. App. 57.

⁵ Delahay v. Goldie, 17 Kan. 263; Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616, 57 N. W. 817; Rust-Owen Lumber Co. v. Fitch, 3 S. Dak. 213, 52 N. W. 879.

⁶ Caldwell v. Asbury, 29 Ind. 451; Peck v. Hensley, 21 Ind. 344. Quasi public corporation not liable. McNeal Pipe & Foundry Co. v. Bullock, 38 Fed. 565.

would be immaterial.⁷ If the lien is sought on the improvements separate from the land,⁸ or the claims of different lienholders demand a separate statement,⁹ or the building is merely appurtenant to some other building, then the improvement upon which a lien is sought should be so described as to show its situation and relation to other improvements to bring it within the lien.¹⁰

§ 239. **Petition—Averment of rendition of services or furnishing of material.**—Whether the petition must contain an allegation that the services or materials went into the building sought to satisfy the lien,¹ or were merely furnished for that purpose,² will depend upon the different statutes and the decisions thereunder.³ Some statutes require that it be shown that they were furnished for and used in the building.⁴ If the owner is sought to be held for services or materials furnished by persons other than the general contractor, as a general rule it must be averred that such services or materials were

⁷ *Clark v. Maxwell*, 12 Ind. App. 199, 40 N. E. 274.

⁸ Description of claims, see § 101.

⁹ *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

¹⁰ *Marshall v. Bank of Archie*, 76 Mo. App. 92.

¹ *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170; *Arkansas River Land, &c., Co. v. Flinn*, 3 Colo. App. 381, 33 Pac. 1006; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643. An allegation in the complaint to enforce a mechanic's lien that "said firm sold and delivered N. certain hardware and building material, to be used in the erection and construction of said building, and affixed and attached

thereto," warrants the finding that the materials were used in the building. *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426. A complaint alleging that plaintiffs sold material "to be used" in the erection of a certain house, that they notified defendant that they "were furnishing" the material for the house, and that a bill of particulars of the material "so furnished and used" is filed with the complaint, sufficiently alleges that the material was used in the house. *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070.

² *Rall v. McCrary*, 45 Mo. App. 365.

³ See Description of Claim, § 109.

⁴ *Watrous v. Elmendorf*, 55 How. Pr. (N. Y.) 461.

used in the structure upon which a lien is sought,⁵ or that the same were furnished for that particular purpose.⁶ In the absence of a specific averment, the petition will be sufficient if so worded that the natural inference would be that they were furnished for the building.⁷ However, the failure of such an averment has been held to be cured by an averment in the answer that the materials were not used in the building, this raising the issue.⁸ Furthermore, if a subcontractor seeks to hold the owner, he must aver that the work and materials were such as will actually come within the original contract, between the owner and principal contractor.⁹ In any case

⁵ *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Hill v. Ryan*, 54 Ind. 118; *Crawfordsville v. Barr*, 45 Ind. 258; *Teachout v. City of Cleveland*, 4 Ohio Dec. 376, 2 Cleve. Law Rep. 58.

⁶ *Indiana*.—*Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Miller v. Roseboom*, 59 Ind. 345; *Crawfordsville v. Brundage*, 57 Ind. 262; *Crawford v. Crockett*, 55 Ind. 220; *Manor v. Heffner*, 15 Ind. App. 299, 43 N. E. 1011; *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. 944.

Kansas.—*Jarvis-Conklin Mortg. Trust Co. v. Sutton*, 46 Kan. 166, 26 Pac. 406. A complaint alleging that plaintiff furnished materials and erected a house on defendant's land under contract with her; that during the progress of the work she requested plaintiff to furnish additional material and labor, not provided for in the original contract; and that she was present while the house was being erected, and directed the work, and agreed to pay therefor, —sufficiently alleges that the ma-

terials furnished and work done were of the kind contracted for, and that the building was erected according to the contract. *Vorhees v. Beckwell*, 10 Ind. App. 224, 37 N. E. 811.

⁷ *Arkansas*. — *McaFadden v. Stark*, 58 Ark. 7, 22 S. W. 884.

New York.—*D'Andre v. Zimmermann*, 17 Misc. (N. Y.) 357, 39 N. Y. Supp. 1086; *Martin v. Flahive*, 112 App. Div. (N. Y.) 347, 98 N. Y. Supp. 577.

Minnesota.—*Stewart v. Simmons*, 101 Minn. 375, 112 N. W. 282.

California.—*Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077. Judgment modified, 89 Pac. 1081.

⁸ *Grace v. Nesbit*, 109 Mo. 9, 18 S. W. 1118.

⁹ *Broderick v. Pollon*, 2 E. D. Smith (N. Y.) 554. A complaint to which are annexed the contract under which some of the articles were furnished, and a bill of particulars of the other articles and services for which the lien is claimed, containing an

where it is sought to recover for extra work, an averment to this effect should be in the petition.¹⁰ An averment showing the time of furnishing the materials or work, under almost all of the statutes, is a material one.¹¹ This averment is essential as showing the time when the lien attaches as well as establishing the lien itself,¹² or its priority over other liens.¹³ An averment that the plaintiff furnished material and performed work in and about defendant's mill, will be held sufficient to show that the work was done by an original, and not a subcontractor.¹⁴

§ 240. Pleading—Averment of consent or contract with the owner.—The petition must have an averment that the material or labor was furnished by agreement or with consent of the

aggregate charge for the articles furnished under the contract, with a reference to the contract, is definite enough. *Barnes v. Stacy*, 73 Wis. 1, 40 N. W. 615. *Contra. Gilman v. Gard*, 29 Ind. 291.

¹⁰ *Smith v. Van Hoose*, 110 Ga. 633, 36 S. E. 77; *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479.

¹¹ See § 113. *McCrea v. Craig*, 23 Cal. 522; *Bradish v. James*, 83 Mo. 313; *Seaman v. Paddock*, 51 Mo. App. 465; *Willamette Falls Trans., &c., Co. v. Smith*, 1 Ore. 171.

¹² *Minnesota*. — *Frankoviz v. Smith*, 34 Minn. 403, 26 N. W. 225.

Missouri.—*Cantwell v. Massman*, 45 Mo. 103; *Peck v. Bridwell*, 10 Mo. App. 524.

New York.—*Jaques v. Morris*, 2 E. D. Smith (N. Y.) 639.

South Dakota. — *Rust-Owen Lumber Co. v. Fitch*, 3 S. Dak. 213, 52 N. W. 879.

Washington.—*Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001. Where a complaint alleges that petitioners delivered materials to defendant during the months of January, February and March, it shows with reasonable certainty that the last of the materials were furnished in March. *Matthews v. Monts*, 61 S. Car. 385, 39 S. E. 575.

¹³ *Jeffersonville Water Supply Co. v. Ritter*, 138 Ind. 170, 37 N. E. 652.

¹⁴ *Christian-Craft Grocery Co. v. Kling*, 121 Ala. 292, 25 So. 629. Matters of defense need not be set up. *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942. Allegation sufficient to bind both purchaser and seller. *Bogue v. Guthe*, 54 Neb. 236, 54 N. W. 588. Allegation sufficient to show for whose immediate use materials were furnished. *Williamson v. Shank* (Ind. App.), 83 N. E. 641.

owner,¹ as this is the basis of the right to a lien.² This may be alleged in general terms.³ However, if the statute makes the owner liable without a direct contract with the owner, then this averment may be omitted, but it must be alleged that there was a contract upon the part of the owner with some one to furnish such labor or materials.⁴ The fact that the petition avers that material was furnished to two persons, will not render it demurrable,⁵ but it may be if the charge is so ambiguous that it can not be discerned who was attempted to be charged.⁶ If the wife is under

¹ *Kerwin v. Post*, 120 App. Div. (N. Y.) 179, 104 N. Y. Supp. 1005. See ante., § 78.

Illinois.—*Leslie v. Reed*, 107 Ill. App. 248; *Baxter v. Hutchings*, 49 Ill. 116.

Massachusetts.—*Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452.

Minnesota.—*O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47.

New Hampshire.—*Pike v. Scott*, 60 N. H. 469.

New York.—*Clapper v. Strong*, 41 Misc. (N. Y.) 184, 83 N. Y. Supp. 935; *Kerwin v. Post*, 120 App. Div. (N. Y.) 179, 104 N. Y. Supp. 1005.

Ohio.—*Spinning v. Blackburn*, 13 Ohio St. 131; *United States Mortgage, &c., Co. v. Wood*, 19 Ohio Cir. Ct. 358, 10 Ohio Cir. Dec. 324.

Oregon.—*Wilcox v. Keith*, 3 Ore. 372.

Pennsylvania.—*Dearie v. Martin*, 78 Pa. St. 55.

Texas.—*Mooris v. Montgomery*, 2 Posey (Tex.) Unrep. Cas. 385.

Washington.—*Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

² *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884; *Parker v. Bell* 7 Gray (Mass.), 429; *Keller v. Struck*, 31 Minn. 446, 18 N. W. 280; *Griggs v. Le Poidevin*, 11 Neb. 385, 9 N. W. 557. Where the lien statement shows such contract, and is made a part of the petition, this is sufficient. *Jarvis-Conklin Mortg. Trust Co. v. Sutton*, 46 Kan. 166, 26 Pac. 406. A subcontractor's petition that alleges that A. was the owner and B. the original contractor will be regarded after verdict as sufficiently alleging that the original contract was made with the owner. *Cole v. Barron*, 8 Mo. App. 509. It must at least be so by implication. *Peck v. Bridwell*, 6 Mo. App. 451.

³ *Tisdale v. Alabama & G. Lumber Co.*, 131 Ala. 456, 31 So. 729.

⁴ *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *McLaughlin v. Schawacker*, 31 Mo. App. 365.

⁵ *Roach v. Chapin*, 27 Ill. 194.

⁶ *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775.

a common law disability, then it will be necessary to aver that the building was a necessary thing for the proper use of the premises.⁷ If the lien is claimed against the owner for work done for a lessee, facts must be pleaded which will show that the owner has agreed to the same, either by contract or otherwise.⁸ In addition to averring that the work was done by agreement or consent of the owner, the terms of the contract must be set out. Especially is this true if the statute fixes a time depending upon the contract when the lien will expire.⁹ So there should be an averment as to the time of payment,¹⁰ and when the work was to be performed.¹¹ A subcontractor in his petition should aver and show that by his contract with the principal contractor he is within the terms of the principal contract.¹² If no statement is made, under the rule that a pleading is to be taken more strongly against the pleader, it may be inferred that the materials were not furnished within the required time and under the original contract.¹³ The pleader may on motion be required to state the terms of the original contract.¹⁴

⁷ *Shilling v. Templeton*, 66 Ind. 585; *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610.

⁸ *Ross v. Simon*, 16 Daly (N. Y.) 159, 9 N. Y. Supp. 536, 10 N. Y. Supp. 742.

⁹ *Illinois*.—*Belanger v. Hersey*, 90 Ill. 70; *Rowley v. James*, 31 Ill. 298; *Roach v. Chapin*, 27 Ill. 194; *Burkhardt v. Relsig*, 24 Ill. 530; *McClurken v. Logan*, 23 Ill. 77; *Senior v. Brebnor*, 22 Ill. 252; *Cook v. Rosinot*, 21 Ill. 437; *Cook v. Heald*, 21 Ill. 425.

¹⁰ *Reed v. Boyd*, 84 Ill. 66; *Phillips v. Stone*, 25 Ill. 66; *Brady v. Anderson*, 24 Ill. 111.

¹¹ *Brown v. Lowell*, 79 Ill. 484;

Columbus Mach. Mfg. Co. v. Dornwin, 25 Ill. 153.

¹² *Thomas v. Trustees of Illinois Industrial University*, 71 Ill. 310; *Broderick v. Boyle*, 1 Abb. Pr. (N. Y.) 319.

¹³ *Rogers v. Powell*, 1 Ill. App. 631.

¹⁴ *Broderick v. Boyle*, 1 Abb. Pr. (N. Y.) 319. Under some statutes it is sufficient if the complaint shows when the debt is due. *Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338. Facts included in statement need not be set out in detail in the petition. *McGeever v. Harris*, 148 Ala. 503, 41 So. 930.

§ 241. Petition stating contract—Completion of work.—

Where the statute requires that the contract under which a lien is claimed is to be set out in the petition,¹ it is not sufficient to set out a note alleging that it was given for the work done.² In such cases, it should be set out by attached copies, but it has been held sufficient if its terms are substantially given;³ especially is this true after verdict when no demurrer had been filed.⁴ If there is a discrepancy between the contract attached as an exhibit and that described in the petition, the exhibit will control.⁵ As a matter of course in order that the record may not be needlessly encumbered if the contract is set forth in any prior pleading, it will be sufficient to refer to it and it need not be repeated.⁶ Where the statute so requires, it must be stated in the pleading whether or not the contract was in writing, and if so give a copy.⁷ But no party can by motion strike out any averment of a pleading, unless its remaining would work to his prejudice.⁸ As the obligation to pay does not mature until the contract is performed, it is as a matter of course essential to aver that such work has been completed and the contract performed.⁹

¹ See setting out claim, ante., § 111. *Stephenson v. Ballard*, 50 Ind. 176.

² *Smith v. Central Lumber Co.*, 113 Ill. App. 477; *Logan v. Dunlap*, 4 Ill. 188; *Logan v. Attix*, 7 Iowa 77.

³ *Simpson v. Dalrymple*, 11 Cush. (Mass.) 308.

⁴ *Edleman v. Kkdd*, 65 Wis. 18, 26 N. W. 116.

⁵ *Benner v. Schmidt*, 44 Ill. App. 304.

⁶ *Parmenter v. Childs*, 12 Iowa 22.

⁷ *Summerman v. Knowles*, 33

N. J. L. 202; *Bangs v. Berg*, 82 Iowa 350, 48 N. W. 90.

⁸ See § 111

⁹ *Robinson v. Chinese Charitable & Benevolent Ass'n*, 47 App. Div. (N. Y.) 69, 62 N. Y. Supp. 292; *Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S. E. 885. Agreement to pay upon completion is implied, if no other agreement is shown. *Burkhart v. Reisig*, 24 Ill. 529. Where a contract has not been completed, the claimant must aver that the owner prevented performance. *Robinson v. Davis*, 8 Del. Co. Ct. 237.

Where a subcontractor brings an action and does not set out the terms of the contract of the principal contractor, or that the conditions making the owner liable have been complied with, his pleading is defective.¹⁰ When the statute fixes the completion of the work as the time when the lien begins, or the time begins to run as to its enforcement, this is a material fact and must be alleged.¹¹ The petition should contain an averment as to the amount due so that in case the property was sold it will be known what portion of the proceeds should be applied on the claim set up in the petition.¹² As the debt is the foundation of the lien, if there is no debt, there is no lien, and hence whether the subcontractor

¹⁰ *Thomas v. Trustees of Illinois Industrial University*, 71 Ill. 310; *Kinney v. Sherman*, 28 Ill. 520.

¹¹ *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Winkle Terra Cotta Co. v. Galena Safety Vault, &c., Co.*, 64 Ill. App. 184; *Kinney v. Sherman*, 28 Ill. 520. In an action to enforce a mechanic's lien, a complaint alleging the completion of the building "on or about" a certain time, and further alleging that the claim of lien was filed within 30 days after such completion, is not demurrable for failure to allege more specifically the date of the completion of the building. *Wood v. Oakland, &c., Rapid Transit Co.*, 107 Cal. 500, 40 Pac. 806. Again, the petition should have averred a time when the contract was to be performed by the agreement, and the time when the money was to be paid, within the times severally limited by the act, as these facts are ma-

terial to a proper understanding, by the court, of the rights of the parties. *Logan v. Dunlap*, 4 Ill. 188. And on the hearing, these allegations should be proved as averred, to entitle the party to a decree. Unless they are alleged, other parties are not apprised of the ground of recovery, and the court is unable to determine whether the labor was performed, the materials furnished, or the money was to be paid within the time prescribed, and whether the proceeding is commenced within six months after the last payment has become due. *Cook v. Heald*, 21 Ill. 425.

¹² See averments in claim or statement, § 113. *Webb v. Kuns* (Cal.), 54 Pac. 78. A complaint to enforce a mechanic's lien which alleges the furnishing of materials at an agreed price is sufficient, *prima facie*, as alleging the value thereof. *Brigham v. Knox*, 127 Cal. 40, 59 Pac. 198. An averment that the amount due

need allege that there is anything due from the owner to the contractor will depend upon the fact whether the owner is liable regardless of this fact, and if not it should be averred.¹³

§ 242. **Petition of subcontractor.**—It is a general rule that when the person filing the complaint is a subcontractor he must aver facts that will bring him within the statute and must show that at the time his lien right attached or existed,¹ the owner was indebted to the principal contractor under and by virtue of the terms of the principal contract.² The allegation as to the amount due will be sufficient if it shows that the amount was large enough to cover the subcontractor's claim without stating the exact sum,³ and the petition will be sufficient on demurrer if this fact appears by inference.⁴ If an answer should be filed admitting that a sufficient sum is due, then this defect is cured.⁵ As a general rule this is not a

petitioners for work, material and labor is the sum of \$13,248.94. upon which has been paid the sum of \$6,550.02, leaving a balance due according to the agreement, of \$6,705.92, and interest thereon, according to a bill rendered, and approved as correct by the defendant, is sufficient. *Reed v. Boyd*, 84 Ill. 66. An averment that a notice of a lien to a certain amount was filed, is not equivalent to an averment that that or any other amount was due. *Crawfordsville v. Irwin*, 46 Ind. 438.

¹³ *Merritt v. Pearson*, 58 Ind. 385; *Norfolk, &c., R. Co. v. Howison*, 81 Va. 125.

¹ *Lawton v. Case*, 73 Ind. 60; *Dart v. Fitch*, 23 Hun (N. Y.) 361;

Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500; *Teahen v. Nelson*, 6 Utah 363, 23 Pac. 764.

² *Epley v. Scherer*, 5 Colo. 536; *Breuchaud v. New York*, 61 Hun (N. Y.) 564, 16 N. Y. Supp. 347; *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625; *McNeal Pipe & Foundry Co. v. Bullock*, 38 Fed. 565.

³ *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Thomas v. Trustees of Illinois Industrial University*, 71 Ill. 310; *Watkins v. Shaw*, 7 Ohio C. C. 415.

⁴ *Ditto v. Jackson*, 3 Colo. App. 281, 33 Pac. 81; *Parsley v. David*, 106 N. Car. 225, 10 S. E. 1028.

⁵ *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674, 52 Am. St. 259; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558.

question to be raised by the contractor, but by the owner.⁷ But the better doctrine is that since the contractor's claim is reduced by whatever the subcontractor may recover, therefore he can raise the question as well as the owner.⁸ However if the statute makes the owner directly responsible,⁹ or if the owner by his own act makes himself directly responsible, some courts have held that no averment as to the amount due the contractor is needed.¹⁰ But the better doctrine is that in all cases, especially where the amount claimed by the subcontractor affects the amount due the contractor, that this amount should be stated.¹¹

§ 243. Petition—Itemized statement—Notice to owner.—

Unless the contract makes the services rendered or materials a lump job for a specified sum,¹ an itemized statement of the labor or materials furnished should be set out in the petition, or in some way referred to so as to give the defendant full knowledge as to the labor or materials furnished for which pay is claimed.² Under some statutes where the person is required to file an itemized statement with the clerk of the county, it is held that such statement need not be filed

⁷ *Drenman v. New York*, 14 Misc. (N. Y.) 112, 35 N. Y. Supp. 244.

⁸ *Scerbo v. Smith*, 16 Misc. (N. Y.) 102, 38 N. Y. Supp. 570.

⁹ *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 589.

¹⁰ *Harris v. Harris*, 18 Colo. App. 34, 69 Pac. 309; *Doyle v. Munster*, 27 Ill. App. 130.

¹¹ *Kloeppinger v. Grasser*, 25 Ohio C. C. 90.

¹ See itemized claim or statement of lien, § 116. *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815; *Lignoski v. Crooker* (Tex. Civ. App.), 22 S. W. 774.

² *Collini v. Nicolson*, 51 Ga. 560; *McLaughlin v. Shaughnessy*, 42 Miss. 520; *Hassett v. Rust*, 64 Mo. 325. A bill of particulars attached to a petition for foreclosure of a lien for material, dated "Ballinger, Tex.," and setting forth, "Mr. W. M. Koger, on lot 4, Block 11, First addition to Ball, bought of J. W. Webb, dealer in dressed lumber, etc.," followed by an itemized statement of the kind, size, and value of the lumber, and made out in the form generally used by such dealers is sufficiently intelligible. *Webb v. Koger*, 78 Tex. 1, 14 S. W. 238.

with the petition.³ If the statute requires that the claim be recorded before it becomes effective, then if the petition does not aver that it has been so recorded, it is defective.⁴ Generally, however, such questions must be raised before trial.⁵ In states that require notice to have been given to the owner, a petition that does not state such fact is defective.⁶ A substantial compliance in this respect, however, is all that is required.⁷ A description of the notice in general terms with reference to the place of its record is held sufficient.⁸ The fact that an exhibit is attached to the petition showing such fact is not sufficient unless the exhibit is in some way made a

³ Wood v. King, 57 Ark. 284, 21 S. W. 471.

⁴ Sedgwick v. Patterson, 2 Posey Unrep. Cas. (Tex.) 352.

⁵ Norcott v. First Baptist Church of Rome, 8 Hun (N. Y.) 639; Brown v. Wood, 2 Hilt. (N. Y.) 579.

⁶ Adams v. Shaffer, 132 Ind. 331, 31 N. E. 1108; Heltzell v. Hynes, 35 Mo. 482. Not required when owner is directly responsible. School Town of Princeton v. Gebhart, 61 Ind. 187. Not required if the fact of such notice is not foundation of action. Irwin v. Crawfordsville, 58 Ind. 492. Is a jurisdictional matter. Hewitt v. Truitt, 23 Mo. App. 443. Especially is allegation and proof of such notice required where a subcontractor intervenes and seeks to be subrogated to the rights of the principal contractor, by reason of collusion, or insolvency of the parties. Pool v. Sanford, 52 Tex. 621. See necessity of averring statement, § 56. Payments prior to notice, § 67.

⁷ Tisdale v. Alabama, &c., Lum-

ber Co., 131 Ala. 456, 31 So. 729; Munster v. Doyle, 50 Ill. App. 672.

Where the complaint states the general character of the materials furnished, and their price, and then avers that plaintiff gave the owner written notice of the agreement to furnish the materials "as aforesaid," it is sufficiently alleged that a notice was given and was sufficient under Code Civ. Proc. 1184, requiring that it state the amount and value of the materials. Russ Lumber & Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747; McDonnell v. Nicholson, 67 Mo. App. 408. It may appear inferentially that the subcontractor's notice was seasonably received by the owner. Miller v. Hoffman, 26 Mo. App. 199.

⁸ It is true, as appellants insist, that merely filing an instrument is not making it an exhibit within the meaning of the law; there must be some identification of it by appropriate reference. Peoria Ins. Co. v. Waiser, 22 Ind. 73; Stafford v. Davidson, 47 Ind. 319.

part of the petition.⁹ An averment of the notice of *lis pendens* where such fact affects the claim of the petitioner, must appear in the petition.¹⁰ Matters of defense should not be averred in the petition.¹¹

§ 244. Petition—Statement as to claim—Jointly where made—Verification.—Whatever the statute requires to be alleged, must be averred in the petition,¹ if not, it is subject to a demurrer. It must also show that required statements were

We do not understand that any particular form of reference is essential; it is sufficient if the complaint identifies the instrument with reasonable identity. *Reed v. Broadbelt*, 68 Ind. 91; *Friddle v. Crane*, 68 Ind. 583. The plaintiff is not confined to the formula, "herewith filed and made an exhibit of this complaint." Words of like import will be sufficient. *Mercer v. Hebert*, 41 Ind. 459; *McCarty v. Burnet*, 84 Ind. 23.

⁹ The notice of the pendency of an action to foreclose a mechanic's lien, which acted as a *lis pendens* on the property, should not be cancelled after judgment, where the time to appeal from the judgment has not expired; such relief not being within Code Civ. Proc. 1674, providing as to the conditions under which such notice may be cancelled. A court has no general power, irrespective of statute, to discharge a notice of *lis pendens* filed in a mechanic's lien case. *Madden v. Lennon*, 23 Misc. (N. Y.) 79, 50 N. Y. Supp. 690.

¹⁰ *John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W.

718; *Pool v. Sanford*, 52 Tex. 621.

¹¹ *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Summerlin v. Thompson*, 31 Fla. 369, 12 So. 667; *R. C. Wilder's Sons Co. v. Walker*, 98 Ga. 508; 25 S. E. 571; *Porteous v. Holmes*, 33 Ill. App. 312. The fact that a material man gave credit solely to the contractor, and agreed to waive his right to a lien, are matters of defense, and need not be negatived in an action to establish a mechanic's lien as part of plaintiff's main case. *Dougherty v. Loebelenz*, 9 Pa. Super. Ct. 344, 43 W. N. C. (Pa.) 447.

¹ *Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 305. In actions by which it is sought to declare and enforce the lien given by statute to mechanics, material men, and the like, every fact necessary to the creation of the lien must be alleged and proved. This is the general rule of pleading, which is applied with much strictness to this class of actions. *Phil. Mech. Liens*, 402 et seq.; *Globe Iron Roofing, &c., Co. v. Thacher*, 87 Ala. 458, 6 So. 366; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918.

filed within the required time,² and that they were such as the law required,³ and were filed where required.⁴ If the statement sets forth in detail what is required, the averments of the

2 Arkansas.—*Arkansas Cent R. Co. v. McKay*, 30 Ark. 682.

Indiana.—*Jeffersonville Water Supply Co. v. Riter*, 138 Ind. 170, 37 N. E. 652; *Davis v. McMillan*, 13 Ind. App. 424, 41 N. E. 851.

New York.—*Hallagan v. Herbert*, 2 Daly (N. Y.) 253.

South Dakota.—*Rust - Owen Lumber Co. v. Fitch*, 3 S. Dak. 213, 52 N. W. 879.

Virginia.—*Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806. The complaint alleges that the lien statement was filed on the 4th day of March, 1890, and that the material and machinery were furnished "between the 7th day of November, 1889, and the 5th day of December, 1889, both dates inclusive." This may have been done and completed long prior to December 5th, and more than 90 days before March 4th, in which case the filing on that day would have been too late. *Hurlbert v. New Ulm Basket Works*, 47 Minn. 81, 49 N. W. 521. A complaint must show that the notice of lien was filed within 60 days after the completion of the building. An averment that the notice was filed within 60 days after the money was to have been paid is insufficient. *Crawfordsville v. Irwin*, 46 Ind. 438. Completion of building. *Crawfordsville v. Barr*, 45 Ind. 258. A complaint which alleges that the labor was

performed "during the years of 1892 and 1893," and that the statement of the lien was filed "November 6, 1893," is sufficient to show that the statement was filed within 90 days after the labor was performed. *J. D. Moran Mfg. Co. v. Clarke*, 59 Minn. 456, 61 N. W. 556.

3 Hicks v. Murray, 43 Cal. 515. Legal conclusions must not be stated. *Price v. Doyle*, 34 Minn. 400, 26 N. W. 14. Facts must be stated, not conclusions. *Kechler v. Stumme*, 4 Jones & Sp. 337, (36 N. Y. Super).

4 Illinois.—*Rittenhouse v. Sable*, 43 Ill. App. 558; *Boals v. Intrup*, 40 Ill. App. 62.

Missouri.—*Gault v. Soldani*, 34 Mo. 150; *Twitchell v. Devens*, 45 Mo. App. 283; *Heltzell v. Langford*, 33 Mo. 396.

Wisconsin.—*Wright v. Allen*, 26 Wis. 661. Clerical error will not defeat. *Edleman v. Kidd*, 65 Wis. 18, 26 N. W. 116. A general allegation that the claim was filed is sufficient. *Watrous v. Elmendorf*, 55 How. Pr. (N. Y.) 461. Only such persons can raise the question as are affected by it. *Keating v. Worthington*, 11 Ohio Dec. (Re.) 428, 27 Wkly. L. Bull. (Ohio) 14. An allegation, in a complaint to enforce a mechanic's lien, that the notice of intention was filed in the recorder's office on a certain day, is a sufficient allegation that the notice was received by

petition should substantially follow these details.⁵ But in this respect a prescribed form need not be followed.⁶ As hereinbefore stated, unless lien claimants are all interested in the subject matter of the action in such a way as to give them a joint right of action, generally they can not join in the petition.⁷ If the same party had a claim arising under different contracts, he could join them all in one proceeding. They should, however, be separately stated and numbered.⁸ The matter of joinder is largely controlled by statutes; some permit it and others forbid,⁹ with frequent changes in this respect.¹⁰ As a general rule, all pleadings must be

the recorder on that day. *Car-riger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266.

⁵ *Schillinger Fire Proof Cement, &c., Co. v. Arnott*, 14 N. Y. Supp. 326; *Dean v. Wheeler*, 2 Wis. 224. Sufficient after judgment. *Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534.

⁶ *Glass v. St. Paul Park Carriage, &c., Co.*, 43 Minn. 228, 45 N. W. 150.

⁷ See joinder of liens in same proceedings, ante, § 204. *Trammell v. Hudmon*, 86 Ala. 472, 6 So. 4; *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907; *Getchell v. Moran*, 124 Mass. 404.

Fraudulent Conveyance.—In proceedings to foreclose a mechanic's lien, other persons than the one against whom the claim was filed as owner were made parties defendant, on the ground that conveyances by and to them, of the premises, were fraudulently made to defeat plaintiff's claim. The complaint asked to have such conveyances declared void. The complaint set forth

only one cause of action, and was not demurrable. *Tisdale v. Moore*, 8 Hun (N. Y.) 19.

⁸ *Kiel v. Carll*, 51 Conn. 440.

⁹ *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Sweetzer v. Harwick*, 67 Iowa 488, 25 N. W. 744. The provision of the Code (Old Code, 167), authorizing the joinder of causes of action, legal and equitable by implication prohibits the union of a cause of action for the enforcement of a lien with one for the collection of a debt, except in the case of a mortgage secured by bond or other obligation of the mortgagor or a third person. *Schillinger Fire Proof Cement, &c., Co. v. Arnott*, 14 N. Y. Supp. 326.

¹⁰ It must be remembered that the mechanics' lien law of this state has been changed at nearly every session of the legislature since the first statute on the subject was passed, and that many former decisions of this court in relation to it rested upon provisions not now in existence.

verified,¹¹ if not, they are subject to motion or demurrer.¹²

§ 245. Pleading—Answer.—The issue in an action on a mechanic's lien is raised as in any other action, and the general rules of pleading apply, and if defendant wishes to controvert any of the material allegations of the petition, it is proper for him to file an answer,¹ and it is error in the court to refuse him that privilege.² As a general rule, if there is no answer, or as it is called in some jurisdictions, plea or affidavit of defense, filed, the plaintiff will be entitled to a decree on his petition.³ In some instances, however, the court will require proof of the truth of the allegations in the petition.⁴ And some courts have held in accordance with the rules applicable to pleadings generally, that the pendency of the motion for security of costs, will not prevent a finding on the pleadings.⁵ In order, however, that there may be a valid finding made against a party defendant, the petition must state a

Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

¹¹ Willamette Falls Transp. & Mill. Co. v. Riley, 1 Ore. 182.

¹² See verification of claim, §§ 119, 120. Daschke v. Schellenburg, 124 Mich. 16, 84 N. W. 67, 7 Det. Leg. N. 475; Wood v. King, 57 Ark. 284, 21 S. W. 471.

Required by Kentucky Statute.—A petition to enforce a lien for materials not stating, as required by Ky. St. 2468, that the statement filed in the county clerk's office, to secure the lien, was subscribed and sworn to by petitioner, or some one in its behalf, is fatally defective. Newport, &c., Lumber Co. v. Lichtenfeldt (Ky.), 72 S. W. 778, 24 Ky. L. 1969.

Sufficient Verification.—A verification of a bill of particulars

served with notice of a mechanic's lien, that such bill is "in all respects true, to the best of his (Claimant's) knowledge and belief," is sufficient. Grey v. Vorhis, 8 Hun (N. Y.) 612.

¹ Roberts v. Miller, 32 Mich. 289. See Dec. & Am. Dig. tit. Mechanics' Liens, § 272.

² Morris v. Ogle, 56 Ga. 592.

³ Irish v. Pheby, 28 Neb. 231, 44 N. W. 438.

⁴ A judgment for want of an affidavit of defense ought not to be given in a scire facias on a mechanic's claim, where the contractor is dead, and his administrator sued. Richards v. Reed, 1 Phila. (Pa.) 220, 8 Leg. Int. (Pa.) 126.

⁵ Hamilton v. Dunn, 22 Ill. 259.

cause of action against him.⁶ If the petition does not state a valid cause of action the decree is a nullity, and the answer will only be held to put in issue those matters directly denied.⁷ If the answer sets up a matter not in the nature of a counter-claim, or set-off, and does not controvert a material averment in the petition, on motion it will be stricken out.⁸ Of course, under the general rules of pleading, if the answer does not constitute a defense, it is subject to a demurrer.⁹ Generally, however, it will be sufficient if it sets up any defense which the defendant may have. Under the Pennsylvania statutes,

⁶ *Judson v. Stephens*, 75 Ill. 255.

⁷ *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546. In an action to foreclose a mechanic's lien, the complaint alleged the date of the completion of the building, and that the lien was filed on April 6, 1894, within 30 days thereafter. The answer denied "that within thirty days from and after the completion of said building, to-wit, upon the 6th day of April, 1894, or at any other time, or at all," plaintiff's filed their claim of lien, containing a statement of their demand. Held, that the answer was but a denial of the time of filing the notice of lien, and of its sufficiency and admitted the allegation of the time when the building was completed. *Lingard v. Beta Theta Pi Hall Assn.* (Cal.), 56 Pac. 58. An allegation merely for the purpose of showing that the work was done with the knowledge of the owner, was properly stricken out. *New Jersey Steel & Iron Co. v. Robin-*

son, 74 App. Div. (N. Y.) 481, 77 N. Y. Supp. 547.

⁸ An averment in the answer that plaintiff was out of employment, and claimed to be owing certain sums for taxes and interest, which he claimed to be unable to pay, was properly stricken out. *Ontario-Colorado Gold Min. Co. v. Mackenzie*, 19 Colo. App. 298, 74 Pac. 791.

⁹ *Alabama, &c., Lumber Co. v. Smith*, 139 Ala. 179, 35 So. 693; *Anisansel v. Goggeshall*, 83 App. Div. (N. Y.) 491, 82 N. Y. Supp. 430. Bond executed by plaintiffs and defendants jointly to prevent lien on property, a good defense. *Gordon v. Norton*, 5 Lack. Leg. N. (Pa.) 381, 23 Pa. Co. Ct. 158, 9 Pa. Dist. 29.

Sufficient Defense.—In an action to enforce a mechanic's lien, an answer by defendant's wife, claiming the property as her separate estate and homestead and alleging that, though the title deeds show the property to be community property, it was bought with her separate money, and under an agreement that it

the answer is made by affidavit of defense.¹⁰ In order for a person to be bound by any decree, he must be made a party. The time for filing an answer is regulated entirely by the statute of the state in which the action is brought.¹¹ Where the old common law pleadings are used, the distinction between matters in abatement and in bar must be observed.¹²

§ 246. Pleading—Answer—General matters.—The ordinary rules of pleading will be applied in determining the sufficiency of the answer.¹ Like other rules, a plea is construed most

should be conveyed to her, all of which plaintiff well knew when he furnished the material, sufficiently presents an issue, and is good on demurrer. *Owens v. Hord*, 14 Tex. Civ. App. 542, 37 S. W. 1093. In an action to enforce a mechanic's lien upon property, a plea which simply avers that "plaintiff has no lien upon the property described in the complaint" is subject to demurrer for its uncertainty, and as being purely the statement of a legal conclusion. *Alabama State Fair, &c., Assn. v. Alabama Gas Fixture, &c., Co.*, 131 Ala. 256, 31 So. 26.

¹⁰ *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 191 Pa. St. 386, 43 Atl. 327; *North End Lumber Co. v. O'Donnell*, 191 Pa. St. 114, 42 Atl. 78; *Yaukey v. Buckman*, 18 Pa. Super. Ct. 378; *Swenk v. Irwin*, 8 Del. Co. Ct. 6, 14 York. Leg. Rec. (Pa.) 12. *Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40.

Sufficient Allegation.—Judgment for want of sufficient affidavit of defense, in proceedings to enforce a mechanic's lien, is

properly denied; it being alleged therein that plaintiff agreed to finish and deliver the house to defendant by a certain time, free of all claims and liens, and that, in addition to plaintiff's claim for balance of contract price, there were three other claims filed against the building for services rendered and materials used in its construction. *Thomas v. O'Donell*, 183 Pa. St. 145, 38 Atl. 597; 41 W. N. C. (Pa.) 210.

¹¹ *Thielmann v. Burg*, 73 Ill. 293.

¹² *Campbell v. Scaife*, 1 Phila. (Pa.) 187, 8 Leg. Int. (Pa.) 74.

¹ *Nevada*.—*Dickson v. Corbett*, 11 Nev. 277.

Pennsylvania.—*Murphy v. Cappeau*, 147 Pa. St. 45, 23 Atl. 438; *Davis v. Church*, 1 Watts & S. (Pa.) 240; *Aman v. Brady*, 2 W. N. C. (Pa.) 262; *Wilt v. Rush*, 1 W. N. C. (Pa.) 103; *Davis v. Stratton*, 1 Phila. (Pa.) 289, 9 Leg. Int. (Pa.) 11; *Campbell v. Scaife*, 1 Phila. (Pa.) 187, 8 Leg. Int. (Pa.) 74; *Finn v. Connell*, 2 Lack. Leg. N. (Pa.) 118; *Geiss v.*

strictly against the pleader.² But if a party is entitled to any relief whatever, under the statements of his pleadings, there should not be a non-suit.³ It has been held that where the facts are within the knowledge or reach of knowledge, an answer on information and belief will not raise an issue,⁴ but if there is a doubt about it, such answer would be held good.⁵ It is held that the statement in the pleading that the pleader "expects to prove certain things", that this is an alle-

Rapp, 1 Walk. (Pa.) 111, 14 Leg. Int. (Pa.) 116.

Wisconsin.—Harbeck v. Southwell, 18 Wis. 418.

Wyoming.—Big Horn Lumber Co. v. Davis, 14 Wyo. 455, 84 Pac. 900, 85 Pac. 1048.

Insufficient Pleas.—Where the complaint alleged that the contract payment was to be made by a certain time, but not that the work was to be completed by that time, or that the payment of the price was contingent thereon, a denial in the answer of the completion of the work was not material, since the defendant might have agreed to make the payment in advance. Rourk v. Miller, 3 Wash. St. 73, 27 Pac. 1029.

Sufficient.—In a proceeding to enforce a mechanic's lien, defenses that the agreed price was payable by installments and that the notice of lien was not filed within six months after the first installments became due, and that there was an action at law pending to recover the same amount, held not irrelevant or frivolous. Webb v. Van Zandt, 16 Abb. Pr. (N. Y.) 190.

Defective Answer.—An answer in effect that the defendant is

not indebted the full amount claimed in the petition is not a denial of any fact on which the right to recover depends and raises no issue. Gray v. Elbling, 35 Neb. 278, 53 N. W. 68.

² Holland v. Wilson, 76 Cal. 434, 18 Pac. 412; Rourk v. Miller, 3 Wash. St. 73, 27 Pac. 1029.

³ Schmid v. Busch, 97 Cal. 184, 31 Pac. 893; Philadelphia Brick Co. v. J. D. Johnson Co., 162 Pa. St. 199, 29 Atl. 864.

⁴ Curnow v. Happy Valley Blue Gravel, &c., Co., 68 Cal. 262, 9 Pac. 149.

⁵ Cowie v. Ahrenstedt, 1 Wash. St. 416, 25 Pac. 458. Where the complaint in a suit to foreclose a mechanic's lien alleges that the claim for a lien was duly recorded, and states its contents substantially in the language of the statute requiring such claim, but the claim as recorded was inartificially drawn, and not in the language of the complaint, a denial in the answer that the claim contains the necessary averments is sufficient to raise an issue as to the alleged claim, though such denial is made on information and belief. Hagman

gation on "information and belief."⁶ Under the common law the plea of *nil debet* which is held to be a general denial, puts the mechanic on proof of his claim.⁷ A plea of non-assumpsit does not raise the question of formal deficiencies in the claim.⁸ A denial that the plaintiff ever had any claim,⁹ or that there is any indebtedness, is a mere conclusion of law, and does not raise an issue of fact.¹⁰ Setting forth in vague terms that the plaintiff has been paid is not a good defense,¹¹ but an averment that the plaintiff is paid more than is due him, is held to be a good defense.¹² A plea that plaintiff has "no lien,"¹³ or "that he has not complied with the law" are likewise held conclusions of law and on proper motions should be stricken out.¹⁴ So it is held that mere denial by the defendant that he is the owner of the land will not raise an issue of defense,¹⁵ for if he had no title, he could not be injuriously

v. Williams, 88 Cal. 146, 25 Pac. 1111.

⁶ Flister v. Kline, 1 Woodw. Dec. (Pa.) 457.

⁷ Hicks v. Branton, 21 Ark. 186.

⁸ Kees v. Kerney, 5 Md. 419; Klinefelter v. Baum, 172 Pa. St. 652, 33 Atl. 582.

⁹ Campbell v. Scaife, 1 Phila. (Pa.) 187, 8 Leg. Int. (Pa.) 74.

¹⁰ Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

¹¹ Smyth v. Armstrong, 2 W. N. C. (Pa.) 383; Finn v. Connell, 2 Lack. Leg. N. (Pa.) 118; Young v. Pulte, 1 W. N. C. (Pa.) 38.

¹² Kee v. Hilt, 33 W. N. C. (Pa.) 104; Collins v. Schoch, 14 W. N. C. (Pa.) 485.

¹³ Lee v. Burke, 66 Pa. St. 336; McDowell v. Hill, 1 Phila. (Pa.) 102, 7 Leg. Int. (Pa.) 179.

¹⁴ Curnow v. Happy Valley Blue Gravel, &c., Co., 68 Cal. 262,

9 Pac. 149. The complaint alleged a contract between the principal contractor and defendant, the owner; a subcontract between the principal contractor and plaintiff; the performance of the subcontract by plaintiff; the reasonable value of the services and materials furnished; the non-payment of a portion of the sum thus due; and the filing of the lien. The answer denied defendant's indebtedness to plaintiff, and that plaintiff had any lien. Held, that such denials were conclusions of law, which did not raise any issues of fact. Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

¹⁵ South Omaha Lumber Co. v. Central Inv. Co., 32 Neb. 529, 49 N. W. 429; Leiby v. Wilson, 40 Pa. St. 63; Spare v. Walz, 15 Phila. (Pa.) 263.

affected unless a personal judgment was sought against him, and if such were the case, then no ownership would not be a defense. The statute of limitations must always be raised by plea, and such matter is a proper defense.¹⁶ As a consent or agreement of the owner is generally essential to the validity of the lien, this fact becomes an issuable one and should be made by answer. If the statute, however, makes the lien enforceable without the owner's consent, then a denial will not raise an issue.¹⁷ As a general rule it may be said that a denial that the material was used in the building or structure on which it is sought to foreclose a lien, will be good and raise an issue to be determined on trial.¹⁸ This fact, however, depends upon whether or not the decisions of the courts of such a state have held that it is necessary in order to foreclose a lien that it must be shown that the material went into the building. Upon this question the courts are not in accord. Whatever defense is set up should not be inferential and argumentative, but a positive averment of facts.¹⁹

§ 247. **Cross-petition.**—The law encourages such a course of action between parties litigant that all matters shall be settled in as few suits as possible and if the defendant has a cross-demand in the nature of a set-off or counterclaim against the plaintiff, he may set it up. While this is not compulsory, yet if the defendant desires any affirmative relief,¹ he must set up whatever his demands may be. The

¹⁶ Philadelphia Brick Co. v. J. D. Johnson Co., 162 Pa. St. 199, 29 Atl. 864; Shannon v. Broadbent, 162 Pa. St. 194, 29 Atl. 865, 34 W. N. C. (Pa.) 466.

¹⁷ Some states allow it to be raised by special demurrer. Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Evans v. Cunningham, 6 Pa. Co. Ct. 156; Hill v. Bramall, 1 Miles (Pa.) 352.

¹⁸ McAnally v. Hawkins Lum-

ber Co., 109 Ala. 397, 19 So. 417; Hoffmaster v. Knupp, 15 Pa. Co. Ct. 465.

¹⁹ Catanach v. Cassidy, 159 Pa. St. 474, 28 Atl. 297.

¹ Where the original contractor does not file any lien but, being made a defendant in a subcontractor's action merely answers, without pleading in the nature of a cross action, he is not entitled to judgment for the amount

pleading in which this is done is usually called a cross-petition,² and it is error to refuse the defendant this privilege if the matter properly arises out of the same transaction.³ Under some statutes it is provided that if an action is brought by one mechanic, then the rights of all mechanics should be determined. Then the court may require the plaintiff to set up the claims of all the mechanics in his complaint, or make an order that all parties claiming or interested in the matter should be made parties and set up their rights.⁴ Where the action of one determines the rights of all, then each can not bring a separate action.⁵ If the petitioner does not set out all the facts necessary to make a lien, and it is necessary to determine his rights in order to determine the rights of others, a defendant in a cross-petition can set forth the facts giving a lien to all.⁶ But a cross-petitioner need not allege matters

of his claim over and above the claims of subcontractors but must be left to his personal action against the owner. *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356. See Dec. & Am. Dig. tit. Mechanics' Liens, § 273.

² *Howett v. Selby*, 54 Ill. 151; *Perkins Oil Co. v. Eberhart*, 107 Tenn. 409, 64 S. W. 760. Owner may set up damages for failure of contractor to perform contract, in action brought by a subcontractor without filing cross-bill. *Julin v. Ristow Pothe Mfg. Co.*, 54 Ill. App. 460. A mechanic's lien may be asserted by an action in the nature of a cross-bill. *Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104, 72 N. W. 29.

³ *Thielman v. Carr*, 75 Ill. 385; *Smalley v. Northwestern Terra-Cotta Co.*, 113 Mich. 141, 71 N. W. 466; *Koch v. Sumner*, 145 Mich. 358, 108 N. W. 725, 116 Am.

St. 302, 13 Det. Leg. N. Mich. 487. "Judge Cooper, in *Hergel v. Laitenberger*, 2 Tenn. Ch. 251, § 254, says: 'A cross bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff respecting the matter in question in the original bill, and must be a defense to the original suit, and an auxiliary to it or dependent upon it, so far that the equity between the co-defendants is the result of complainant's litigation.'" *McRae v. University of the South* (Tenn. Ch. App.), 52 S. W. 463.

⁴ *Emack v. Campbell*, 14 App. D. C. 186.

⁵ *Culver v. Lieberman*, 69 N. J. L. 341, 55 Atl. 812; *Nason v. Northwestern Milling, &c., Co.*, 17 Wash. 142, 49 Pac. 235.

⁶ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

that are proper for defenses.⁷ The same rules of pleading apply to cross-petitions as other pleadings, and a cross-petitioner cannot recover more than he asks for,⁸ and if he does not state a good cause of action, his cross-petition is subject to demurrer.⁹ No particular form is required, and in some instances as where some part is presumed to be prepared by the mechanic himself, the rule is not as strict as in ordinary pleadings.¹⁰ Generally all matters should be set up with such particularity as is required if the party was beginning a suit, alleging all facts required by statute¹¹ that relate to or depend upon the transaction upon which the plaintiff's action is brought,¹² and if any party is to be affected otherwise than permitted by the allegations of the petition, such party must be served with process.¹³ However, in some jurisdictions, as stated in the beginning of this section, any claim or set-off is allowed to be set up against the demand of the plaintiff. Such matters

⁷ The rule of pleading at common law is that, in declaring on a statute, where there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but where there is no exception in the enacting clause, but an exemption in a proviso or in a subsequent section, it is a matter of defense. *Myers v. Carr*, 12 Mich. 63; *People v. Curtis*, 95 Mich. 212, 54 N. W. 767. This rule is also applied in equity. *Attorney General v. Oakland County Bank*, Walk. Ch. 90; *Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104, 72 N. W. 29.

⁸ *Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008.

⁹ *Meyers v. Wood*, 26 Tex. Civ. App. 591, 65 S. W. 671.

¹⁰ The exhibit of lien holders, who come in under notice from

one who wishes to enforce a mechanic's or material man's lien, is not governed by the strict rules relating to pleadings in ordinary actions. *Tibbetts v. Moore*, 23 Cal. 208.

¹¹ *Ford Gold Min. Co. v. Langford*, 1 Colo. 62; *Sutherland v. Ryerson*, 24 Ill. 518; *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103.

¹² *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860; *Koempel v. Shaw*, 13 Minn. 488.

¹³ *Jewett v. Iowa Land Co.*, 64 Minn. 531, 67 N. W. 639, 58 Am. St. 555. If the complaint is brought in a court of equity, while it might not entertain a cross-petition in damages, under the old forms of pleading, yet it would protect him until he could sue and recover at law. *Brown v. Boker*, 20 D. C. 99.

will depend very largely upon the code of procedure in the state where the action is brought.

§ 248. **Reply.**—The matter of reply is likewise governed by the code of procedure of the different states. General rules of pleading, however, recognize the fact that unless the answer contains an allegation of new matter, no reply is necessary.¹ And under some statutes, all such new matter is deemed controverted without a reply,² and under others a notice must be given plaintiff if an answer is filed, and unless such notice is given, no reply is required.³ As a general rule, only matters can be set up in a reply that constitute a defense to some allegation of new matter in the answer,⁴ and a defective petition cannot be cured of its failure to contain essential averments, by setting them up in a reply.⁵ This would be what is known in pleading as a departure. However, sometimes in order to avoid circuity of action new matter is allowed in a reply.⁶ No further pleading is now generally permitted

¹ *Englebrecht v. Rickert*, 14 Minn. 140. Where a bill has been filed to enforce a mechanic's lien, a claim for recoupment in the answer on the ground that the work was badly done does not make such answer one setting up new matter calling for affirmative relief, and no special reply thereto is necessary, under Code, c. 125, § 35, but such claim is only matter of defense to the bill, and is met by a general replication. *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096. See Dec. & Am. Dig. tit. Mechanics' Liens, § 275.

² *Johnson v. Lau*, 58 Minn. 508, 60 N. W. 342; *Bruce v. Lennon*, 52 Minn. 547, 54 N. W. 739.

³ *Liennemeyer v. Miller*, 70 Ill. 244; *Person v. Smith*, 30 Ill. App. 103.

⁴ *Helena Lumber Co. v. Montana Cent. R. Co.*, 10 Mont. 81, 24 Pac. 702. The defendant pleaded payment, and set out certain checks, etc., to support his plea. The plaintiff, in his reply, alleged that \$150 of the amount so paid was for extra work, describing it, which had been performed on the building by the plaintiff at the defendant's request. A motion to strike this allegation out of the reply was properly overruled. *Hibbard v. Talmage*, 32 Neb. 147, 49 N. W. 219.

⁵ *Dearle v. Martin*, 78 Pa. St. 55.

⁶ Where the answer alleged that plaintiff had been a guarantor on the contractor's bond, and that a liability thereon had accrued, any defense on behalf of

by the codes of procedure and whatever matter is contained in the reply will be considered as denied without further pleading.⁷

§ 249. **Demurrer.**—A demurrer serves the same office in pleadings in actions on mechanics' liens that it does in other actions, and if no cause of action is stated the question is properly raised by a demurrer¹ and not by answer.² But a demurrer to the complaint will not be entertained after an answer has been filed.³ The question whether or not a demurrer will lie rests upon the allegations and facts stated in the petition and exhibits thereto which are made a part thereof,⁴ and if the entire petition contains a good cause of action, although some portions are not proper, a general demurrer will not lie; the objectionable parts should be reached by motion to strike,⁵ or by a special demurrer,⁶ and should be taken advantage of before verdict.⁷ If it requires proof to

the guarantor should have been set out by way of reply. *Closson v. Billman*, 161 Ind. 610, 69 N. E. 449.

⁷ The proceeding to enforce a mechanic's lien is strictly a chancery proceeding, and must be governed by the rules of pleading applicable to chancery cases. In chancery, special replications are no longer allowed and if filed, can only be treated as general replies. *Shaeffer v. Weed*, 8 Ill. 511.

¹ *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625. If sustained it affects all parties in interest—"Estimate" defined. *Brown v. Cornwell* (Va.), 60 S. E. 623.

² *Scholl v. Gerhab*, 93 Pa. St. 346; *Lybrandt v. Eberly*, 36 Pa.

St. 347. See Dec. & Am. Dig. tit. Mechanics' Liens, § 275.

³ *Pittsburgh Heating Supply Co. v. Will*, 5 Pa. Dist. 618.

⁴ *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884; *Brandt v. New York*, 186 N. Y. 599, 79 N. E. 1101. A bill to foreclose a mechanic's lien is demurrable when it sets out a copy of the notice of claim which on its face is insufficient. *Minor v. Marshall*, 6 N. Mex. 194, 27 Pac. 481.

⁵ *Bourgette v. Hubinger*, 30 Ind. 296; *Lee v. Kimball*, 45 Wash. 656, 88 Pac. 1121.

⁶ *Slight v. Patton*, 96 Cal. 384, 31 Pac. 248.

⁷ After verdicts the receiving court is to uphold the pleadings by every legal intentment.

show that the facts alleged are insufficient, then a demurrer will not lie.⁸ Neither will a demurrer lie where the complaint or petition is merely indefinite if sufficient remains to show a cause of action.⁹ As a general rule, the petition will be sufficient if it states a cause of action of any kind. In other words, a demurrer will not lie if the petition states sufficient facts to allow the rendition of a personal judgment.¹⁰ The proper procedure in such a case would be to move to strike out the part of the petition which does not state a cause of action.¹¹ The general grounds for demurrers are usually fixed by statute. Among other things, petitions have been held open to demurrer where they failed to show that the lien was filed within the required time,¹² or that the materials were furnished within the time limit,¹³ or failed to set out the contract,¹⁴ or omitted a necessary person,¹⁵ or set out a wrongful

Skyrme v. Occidental Mill & Min. Co., 8 Nev. 219.

⁸ **Coddington v. Beebe**, 29 N. J. L. 560.

⁹ **Houston Cotton Exch. v. Crawley**, 3 Tex. App. Civ. Cas. § 138.

¹⁰ **California**.—**Knowles v. Baldwin**, 125 Cal. 224, 57 Pac. 988.

Indiana.—**Rankin v. Walker**, 65 Ind. 222; **Farrell v. Lafayette Lumber & Mfg. Co.**, 12 Ind. App. 326, 40 N. E. 25.

Nebraska.—**Griggs v. Le Poldevin**, 11 Neb. 385, 9 N. W. 557.

New York.—**Power v. Onward Const. Co.**, 39 Misc. (N. Y.) 707, 80 N. Y. Supp. 950.

Pennsylvania.—**Pittsburgh Heating Supply Co. v. Will**, 5 Pa. Dist. 618.

Washington.—**Lee v. Kimball**, 45 Wash. 656, 88 Pac. 1121.

¹¹ **Lawton v. Case**, 73 Ind. 60; **Poole v. Fellows**, 25 R. I. 64, 54

Atl. 772. If the subject-matter of a mechanic's claim is apparently within the statutes, other objections to the face of the claim must be made either by motion to strike off or by demurrer to the scire facias. **Bernhelsel v. Smothers**, 5 Pa. Super. Ct. 113, 41 W. N. C. (Pa.) 40.

¹² **Coddington v. Beebe**, 29 N. J. L. 560; **Phillips v. Roberts**, 26 W. Va. 783; **Willer v. Bergenthal**, 50 Wis. 474, 7 N. W. 352.

¹³ **Kinzey v. Thomas**, 28 Ill. 502.

¹⁴ **Goulding v. Smith**, 114 Mass. 487.

¹⁵ The complaint on demurrer will not be considered as not stating a cause of action, because it fails to aver that there were no other lienors. **Frederickson v. Riebsam**, 72 Wis. 587, 40 N. W. 501. The failure to aver, in a bill filed to foreclose a mechanic's lien, that the receiver of the es-

or confusing description of the property;¹⁶ provided, as a matter of course, that such defects appear on the face of the petition.¹⁷ The pleader who follows the statute will not find himself obstructed by a demurrer.¹⁸ If statements are irreconcilably inconsistent in the several parts of the petition, rendering it ambiguous, a demurrer will lie.¹⁹ However, if all parts taken together make a cause of action a demurrer should not be sustained.²⁰ No material facts required to secure the lien will be presumed.²¹ On the theory that an answer is not proper where the petition does not state a cause of action, some courts have held that filing an answer is an admission that the facts stated in the petition are sufficient to sustain the lien.²² But this will not be true where the

tate of the debtor is joined as a defendant by leave of the court which appointed him, is a substantial defect, and the objection may be raised by general demurrer. *Steel Brick Siding Co. v. Muskegon Mach., &c., Co.*, 98 Mich. 616, 57 N. W. 817.

¹⁶ A petition to foreclose a mechanic's lien alleged that the owner received title to the whole of a certain block by one conveyance, admitted that it was divided into lots, but only by imaginary lines, and claimed a lien on the whole of it. The recorded description of the land required by law was contained in the affidavit as follows: "Lot one or two of block sixty-six;" and the affidavit alleged that the material was furnished to erect "the house on lot one or two" but did not allege any confusion in the numbering of the lots, or that the house was on a particular one. Held, that the claim of lien in the petition was uncertain and

contradictory, when taken with the claim in the affidavit, and a demurrer was properly sustained. *Lyon v. Logan*, 66 Tex. 57, 17 S. W. 264.

¹⁷ *Frederickson v. Riebsam*, 72 Wis. 587, 40 N. W. 501.

¹⁸ *Foster v. Skidmore*, 1 E. D. Smith (N. Y.) 719.

¹⁹ *Frazer v. Barlow*, 63 Cal. 71.

²⁰ The statement in a mechanic's lien was that the said materials were to be paid for 60 days from the first of the month next after delivery. The petition to foreclose the lien stated that payment was to be made 60 days after the date of the delivery, respectively, of the items of materials furnished. The statement was filed as an exhibit to the petition. The demurrer was improperly sustained. *Schroth v. Black*, 50 Ill. App. 168.

²¹ *Cross v. Tscharnig*, 27 Ore. 49, 39 Pac. 540.

²² *Wood v. King*, 57 Ark. 284, 21 S. W. 471. In an action to

answer is a general denial. The right to raise the question on the hearing as to the defect of the parties or other jurisdictional matters, is not waived by filing a demurrer or answer.²³

§ 250. **Pleadings—Amendments.**—As a general rule, the right to amend in an action to foreclose a mechanic's lien is the same as in other actions and is governed by the laws of pleadings in the different states.¹ Amendments are allowed, even on the trial to conform to the evidence if no one is prejudiced thereby.² As a matter of course, before trial, amendments are almost always allowed.³ The courts adopt a liberal rule as to such matters and unless it is manifest that an injustice will be done, amendments will be allowed when properly requested.⁴ But courts are not bound to allow amendments that will set up a new cause of action; this is a

foreclose a mechanic's lien for material furnished the contractor in the erection of a building, the petition was drawn as though the contract had been made with the owner of the building, instead of the contractor. A general demurrer to the petition on behalf of the owner was overruled. While the petition was informal and defective in its statements as to the acts of the contractor, the owner waived the objection by answering over, and contesting the case upon the merits. *Pomeroy v. White Lake Lumber Co.*, 33 Neb. 240, 44 N. W. 730.

²³ *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62.

¹ *Gambling v. Haight*, 58 N. Y. 623; *Murphy v. Guistl*, 22 R. I. 588, 48 Atl. 944; *McGee v. Piedmont Mfg. Co.*, 7 Rich. (S. Car.)

263. Amendment of claim or statement, see § 123.

² *Illinois*.—*Merritt v. Crane Co.*, 126 Ill. App. 337; judgment modified; 225 Ill. 181, 80 N. E. 103.

Indiana.—*Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47.

Michigan.—*Smalley v. Northwestern Terra-Cotta Co.*, 113 Mich. 141, 71 N. W. 466.

Missouri.—*Baltis v. Friend*, 90 Mo. App. 408.

New York.—*Poerschke v. Horowitz*, 178 N. Y. 601, 70 N. E. 1107. Affirmed, 84 App. Div. (N. Y.) 443, 82 N. Y. Supp. 742.

³ *Challoner v. Howard*, 41 Wis. 355.

⁴ *Indiana*.—*Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152; also (Ind.) 36 N. E. 51.

Massachusetts.—*Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110.

matter which lies in the sound discretion of the court.⁵ If the parties to the action have been mistakenly described, the

Michigan.—*Daschke v. Schellenberger*, 124 Mich. 16, 84 N. W. 67, 7 Det. Leg. N. 475; *Kilby Mfg. Co. v. Menominee Circuit Judge*, 138 Mich. 277, 101 N. W. 522, 11 Det. Leg. N. 540.

Rhode Island.—*Spencer v. Doherty*, 17 R. I. 89, 20 Atl. 232. Pub. St. c. 191, § 2, provides for a lien for labor alone under a contract for labor and materials, where it can be distinctly shown what such labor was worth. Section 8 provides that the validity of a lien shall not be affected by any inaccuracy in stating amount due for labor unless petitioner willfully claims more than is due. A complaint to establish a lien for labor under an entire contract for \$8,300, for labor and materials set forth the value of the labor at \$5,663.02. \$2,000 had been paid on the contract. In the petition half this sum was credited on the amount due for labor. An amendment striking out the \$1,000, and claiming the full value of the labor stated, was properly allowed, the amount unpaid exceeding the total claim of the labor. *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628.

Common Counts.—Where a declaration contains a special count for the enforcement of an alleged lien, and common counts for work done and materials furnished and an account stated, with allegations following the

common counts applicable to the special count alone, and defendant demurs to the declaration, and every part except the common counts, and the court sustains the declaration as to the stated portions, it is not error to require defendant to plead to the common counts, without requiring plaintiff first to amend his declaration by striking the matter held bad on demurrer. *West v. Grainger*, 46 Fla. 257, 35 So. 91.

⁵ *Carey-Lombard Lumber Co. v. Daugherty*, 125 Ill. App. 258; *Joseph N. Eisendrath Co. v. Gebhardt*, 124 Ill. App. 325, decree affirmed, 222 Ill. 113, 78 N. E. 22. The issues to be tried in an action are not matters of form but are of the substance of the litigation. The provision, therefore, of the mechanics' lien law for the city of New York (5 Chap. 500, Laws of 1893), making matters of form amendable at all times, does not require the court to amend, as a matter of course, the pleadings upon the trial of an action to foreclose a lien under said act, but it is within its discretion, and it is not an abuse thereof to refuse an amendment which introduces an entirely new cause of action or defense. *McGraw v. Godfrey*, 14 Abb. Pr. (N. S.) (N. Y.) 397; also 16 Abb. Pr. (N. S.) (N. Y.) 358; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887. Cause against husband cannot be

pleader is generally allowed to amend by setting out a correct description.⁶ But this may be refused where the misdescription was due to negligence.⁷ So if there is a misdescription of property, an amendment is generally allowed.⁸ But it should not be allowed to affect an innocent person prejudicially.⁹ In some cases amendments have been allowed which changed

charged against wife. *Jennings v. Huggins*, 125 Ga. 338, 54 S. E. 169.

⁶ *Brosnan v. Trulson*, 164 Mass. 410, 41 N. E. 660; *Washburn v. Burns*, 34 N. J. L. 18; *Jobe v. Hunter*, 165 Pa. St. 5, 30 Atl. 452, 44 Am. St. 639; *Nary v. Henni*, 45 Wis. 473. Not allowed. *Perkins v. Boyd*, 37 Colo. 265, 86 Pac. 1045.

⁷ There is a wide difference between a mere mistake and a known misstatement—between a mere error that may happen to any one, however careful he may be in the preparation of a cause, and carelessness which cannot be excused. The statute provides for these differences by making the order for amendment discretionary with the court, for it says (Section 14) the court may order the lien-claim amended when it shall appear that such amendment can be justly made. In my judgment it would be a bad precedent, and an unjust exercise of the discretion given to the court, to permit the plaintiff now to amend his lien-claim and issue the summons against Frank Ward, his only debtor, for the purpose of charging the lands of Mrs. Curnice under the stat-

ute, when with knowledge of all the facts, he has first charged another as his debtor. *Bartley v. Smith*, 43 N. J. L. 321.

⁸ *Wasson v. Beauchamp*, 11 Ind. 18; *Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47; *Wheeler v. Monett Milling Co.*, 73 Mo. App. 672; *Schmidt v. Gilson*, 14 Wis. 514, [558].

⁹ *McCarty v. Van Etten*, 4 Minn. 461. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants prepare their own papers, and it is not necessary that the description should be either full or precise. *Kennedy v. House*, 41 Pa. St. 39, 80 Am. Dec. 594; *McClintock v. Rush*, 63 Pa. St. 203; *Northwestern Cement & Concrete Pav. Co. v. Norwegian-Danish Evangelical Lutheran Augsburg Seminary*, 43 Minn. 449, 45 N. W. 868; *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22; *Hotaling v. Cronise*, 2 Cal. 60; *Tredinnick v. Red Cloud, &c.*, Min. Co., 72 Cal. 78, 13 Pac. 152; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633.

the form of action.¹⁰ However an amendment should not be allowed which results in no cause of action being stated.¹¹ The parties affected have a right to answer or plead to the new or amended matter.¹² But if they do not plead anew the pleading already filed will be considered as made to the amended matter.¹³

§ 251. **Pleadings—Issue.**—The object of all pleadings is to get into some definite form a certain fact which can be established or disestablished by proof. This certain and material point which is affirmed on one side and denied on the other

¹⁰ **Delaware.**—Wood v. Wilmington Conference Academy, 5 Houst. (Del.) 513.

Georgia.—Reynolds v. Randall, 97 Ga. 231, 22 S. E. 577; Dunning v. Stovall, 30 Ga. 444.

Mississippi.—Prairie Lodge, No. 87 v. Smith, 58 Miss. 301; Duff v. Snider, 54 Miss. 245.

Missouri.—Shaffner v. Leahy, 21 Mo. App. 110.

Wisconsin.—Lackner v. Turnbull, 7 Wis. 105.

A change in the form of action brings the necessity of a change in the judgment, different from that in which the original suit was brought. If assumpsit were brought on a sealed instrument, could the court decline to permit a change of action to "debt" or "covenant?" The amendment of the proceeding in this case did not bring into the record any new or additional cause of action. The contract was precisely the same, the amount claimed was the same, the plaintiffs in error could have relied upon the same grounds of defense that were applicable to the action of assumpsit. That

no sort of prejudice did or could accrue to them, is made manifest in the record. Weathersby v. Sinclair, 43 Miss. 189; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

¹¹ Crawford v. Crockett, 55 Ind. 220; Bailey v. Johnson, 1 Daly (N. Y.) 61.

¹² Bowman v. McLaughlin, 45 Miss. 461.

¹³ In an action to enforce a mechanic's lien, where a cross-petition by one of the defendants sets up a mechanic's lien in his favor, and prays for a foreclosure of the same and a sale of the premises, and an answer is filed containing a general denial, and upon the trial the court permits the cross petition to be amended, so as to allege the abandonment of work upon the building in the place of its completion, the answer on file will be regarded as putting in issue such amendment; and when the court and parties proceed with the trial as if the alleged abandonment was one of the issues, the failure of the court to permit the filing of a

is called the issue.¹ An allegation in a pleading which contains an averment that is essential to the establishment of the claim of the defense, and which cannot be stricken out without leaving it insufficient, is a material allegation.² As a general rule the title to the property is not in issue in a suit to enforce a mechanic's lien.³ But it may be, and if there are prior claims which will affect the sale of the property or are proper incidents of the suit, a court of equity will adjust the rights of all parties and may quiet the title.⁴ A reason for this is that the purchaser may have a clear title and thus be induced to pay a full price for the property. A general denial that plaintiff's claim constitutes a lien on the land puts in issue the liability of the land to be charged.⁵ And a denial that the lien has been properly obtained puts in issue the question whether the statutory requirements have been complied with.⁶ And it is held where the petition is amended after an answer is filed, that the issue will be considered between the amended petition and the answer.⁷ If there is matter put in issue that is affirmed on one side and denied on the

new denial is not erroneous or prejudicial. *Great Spirit Springs Co. v. Chicago Lumber Co.*, 47 Kan. 672, 28 Pac. 714.

¹ Issues arise in pleadings where the fact, or conclusion of law is maintained by one party and controverted by the other. Section 5128, Ohio statutes. See Dec. & Am. Dig. tit. Mechanics' Liens, § 277.

² *Gerry v. Painter*, 9 Pa. Super. Ct. 150, 43 W. N. C. (Pa.) 275. Section 5082, Ohio statutes.

³ *Falconer v. Frazier*, 7 Sm. & M. (Miss.) 235; *Steininger v. Raeman*, 28 Mo. App. 594. Since a suit to enforce a mechanic's lien on land for the erection of a

building thereon is, so far as the owner of the land is concerned, a proceeding in rem, his title is not put in issue in such an action; and such issue, even if raised by the pleadings, would be immaterial. *Washburn v. Burns*, 34 N. J. L. 18.

⁴ *Dugan v. Scott*, 37 Mo. App. 663.

⁵ *Beach v. Wakefield*, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197; *Fitzpatrick v. Thomas*, 61 Mo. 512.

⁶ *Central City Brick Co. v. Norfolk, &c., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

⁷ *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. Amendments, see § 250.

other that is immaterial, evidence offered thereon will be a nullity.⁸ However, the mere fact that the effect of the averment is uncertain will not make it immaterial.⁹ So no recovery can be had if material facts are found to be true which were not averred and which if averred in the pleading would have entitled plaintiff to recover on that basis.¹⁰ It is a familiar principle that the allegations tending to make the issue and the proof offered must agree.¹¹

§ 252. Issue—Matters to be proven.—The rule is well recognized that in order to recover on a mechanic's lien, all the material facts constituting a cause of action must be proven,¹ and what is a material fact will, as a matter of course, depend upon the particular statute creating the lien. Necessarily if these facts are not proven, the right will fail.² As a general rule, plaintiff must prove that the building was

⁸ *Westhus v. Springmeyer*, 52 Mo. 220; *Wyman v. Quayle*, 9 Wyo. 326, 63 Pac. 988. Where an action was expressly brought to foreclose and enforce a material man's lien, and the petition thereon contained no prayer for any relief except that "said lien be set up and established," a verdict, finding generally in the plaintiff's favor a designated amount, and a judgment following the same, but neither of them in any manner referring to the lien described in the petition, were unauthorized. *Ryals v. Smith*, 102 Ga. 768, 29 S. E. 968.

⁹ "The line of distinction between an uncertain or defective averment of a material fact and a total want of such averment is well defined by the authorities, especially in this state; and it

has been uniformly held that, if the defect in the averment be merely that of uncertainty, it will be waived by failure to demur specially on the ground of uncertainty, and, of course, by a default." *San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057.

¹⁰ *Whiting v. Koepke*, 71 Conn. 77, 40 Atl. 1053.

¹¹ *Ludwig v. Huverstuhl*, 108 Ill. App. 461; *Kewanee Boiler Co. v. Genoa Electric Co.*, 106 Ill. App. 230. See §§ 254, 255.

¹ *Cronkright v. Thomson*, 1 E. D. Smith (N. Y.) 661.

² *Wynn v. South River Brick Co.*, 99 Ga. 126, 24 S. E. 869; *Tomlinson v. Degraw*, 26 N. J. L. 73; *Donnelly v. Libby*, 1 Sweeny (31 N. Y. Super.) 259.

on the land sought to be subjected to the lien,³ and that the contracting party is the owner,⁴ and that the required statutory notice has been given,⁵ and that if a note has been given, it has not been paid.⁶ Some statutes require a description of notes where notes are given,⁷ and that plaintiff should allege that a contract was entered into and performed.⁸ And generally it may be reiterated that all the facts giving the right to a lien must be set out. Between several claimants, it is likewise necessary that all the facts constituting their rights should be shown.⁹ The statutes sometimes, one fact being shown, will raise a presumption as to another.¹⁰ Generally, however, facts that are properly averred in the pleadings and not denied or otherwise disputed by answer are presumed to be true (in some jurisdictions) without further proof than the pleading.¹¹ Whatever evidence or proof is admissible should support the issue; if not, it should be rejected.¹²

³ *Hutton v. Maines*, 68 Iowa 650, 28 N. W. 9.

⁴ *Munster v. Doyle*, 50 Ill. App. 672.

⁵ *Killian v. Eigenmann*, 57 Ind. 480; *Wehr v. Shryock*, 55 Md. 334; *Roberts v. Miller*, 32 Mich. 289; *Noll v. Kenneally*, 37 Neb. 879, 56 N. W. 722.

⁶ *Finch v. Redding*, 4 B. Mon. (Ky.) 87.

⁷ Ohio Statutes, see § 81.

⁸ *Gunther v. Bennett*, 72 Md. 384, 19 Atl. 1048; *Willard v. Magoon*, 30 Mich. 273; *Hauptman v. Halsey*, 1 E. D. Smith (N. Y.) 668.

⁹ In a contest between material men and subcontractors for the fruits of the contract, the head contractor's failure to dispute the claims, of which statutory no-

tice has been filed with the owner, and by him with the head contractor, is not prima facie evidence of the correctness of such claims as valid liens, as each claimant to such lien must establish every element necessary under the statute to the validity of his claim as a lien. *Bender v. Stettinius*, 10 Ohio Dec. (Re.) 186, 19 Wkly. Law Bull. (Ohio) 163.

¹⁰ *Vogel v. Luitwieler*, 52 Hun (N. Y.) 184, 5 N. Y. Supp. 154.

¹¹ *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863.

¹² *Munger v. Green*, 20 Ind. 38; *Stapleton v. Mayer*, 17 Misc. (N. Y.) 67, 39 N. Y. Supp. 845; *Bergsma v. Dewey*, 46 Minn. 357, 49 N. W. 57; *Morowsky v. Rohrig*, 4 Misc. (N. Y.) 167, 23 N. Y. Supp. 880.

§ 253. **Matter to be specially pleaded.**—The general rule where the petition states a good cause of action and the same is admitted to be true, and the defendant has some good claim to prevent the enforcement of the lien is that such claim must be specially pleaded. It can not be raised by a general denial.¹ Perhaps upon this matter the courts would vary in their conclusions. Some courts hold that a defense that the contract was made by an agent without authority,² or that the property is exempt by reason of being a homestead,³ or that the petitioner is a guarantor against liens on the property,⁴ or that there is a prior claim,⁵ or that the action was not begun within the time required by law, must be specially pleaded and cannot be proven unless so pleaded.⁶ So if the owner wishes to avail himself of a breach of the contract he must plead this fact.⁷ So if the statute requires certain matters to be set up in a defense, proof could not be offered if the matter is omitted.⁸ If a case should be tried on a different theory from that presented by the petition, it is proper to

Answer for debt of another.—

Where, in an action to enforce a mechanic's lien, the counsel agree that the material was furnished and charged to the contractor who did the work, it is not error to admit evidence of a verbal agreement by the owner, who was the original defendant, to pay for such materials in the absence of a plea of the statute of frauds. *Pool v. Wedemeyer*, 56 Tex. 287.

¹ *Hallahan v. Herbert*, 11 Abb. Pr. (N. S.) (N. Y.) 326, 4 Daly (N. Y.) 209. A general denial entered by the owner of a building in a proceeding by the materialman to enforce his lien is sufficient to put the materialman on proof of the amount actually due

for such material furnished. *Lee v. Storz Brewing Co.*, 75 Neb. 212, 106 N. W. 220.

² *Dickson v. Corbett*, 11 Nev. 277.

³ *Bergsma v. Dewey*, 46 Minn. 357, 49 N. W. 57.

⁴ *Kelley v. Plover*, 103 Cal. 35, 36 Pac. 1020.

⁵ *Security Mortgage, &c., Co. v. Caruthers*, 11 Tex. Civ. App. 430, 32 S. W. 837.

⁶ *Tomlinson v. Degraw*, 26 N. J. L. 73.

⁷ *Blethen v. Blake*, 44 Cal. 117; *Emmet v. Rotary Mill Co.*, 2 Minn. 286.

⁸ Under the requirement of Laws, N. Y., 1885, c. 342, § 17, that, in an action to enforce a mechanic's lien, all persons who

allow a defense in accord with the theory upon which it is tried.⁹ A plea of payment is one of confession and avoidance and admits that all the necessary statutory attempts and steps to perfect the lien have been taken.¹⁰ A general denial of the sale of the material for the purpose alleged and of the ownership of the land, will serve as a general denial and put upon the plaintiff the burden of proving the existence of all the necessary facts entitling him to a lien.¹¹ A general denial of the allegations of the petition requires proof of every material allegation therein not admitted of record to be true.¹² But a mere averment that the defendants are not liable, has been held not to require plaintiff to prove ownership of prop-

shall have filed notices of liens shall set their claims forth by answer, the admission of proof, without objection, in support of a claim, does not dispense with the necessity of alleging it in the answer. *Hondorf v. Atwater*, 75 Hun. (N. Y.) 369, 27 N. Y. Supp. 447.

⁹ *Frazier v. McGuckin*, 26 Jones & Sp., (58 N. Y. Super.) 71, 9 N. Y. Supp. 435.

¹⁰ *St. Clair Coal Co. v. Martz*, 75 Pa. St. 384; *Lybrandt v. Eberly*, 36 Pa. St. 347; *Lucas v. Brockway* (Pa.), 13 Atl. 285; *Lewis v. Morgan*, 11 Serg. & R. (Pa.) 234; *Geiss v. Rapp*, 1 Walk. (Pa.) 111, 14 Leg. Int. (Pa.) 116.

¹¹ **Premature payments.**—Code Civ. Proc. Cal., § 1184, provides that no payment made on a building contract prior to the time when the same is due under the contract shall defeat any lien in favor of any one save the contractor but such payment shall be deemed as if not made. Held, that where payments are made

on a contract before the time required, and a material man sued to establish a lien, the complaint alleging that there was due the contractor the sum prematurely paid, the allegation sufficiently raised an issue as to the premature character of the payment. *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512.

General denial.—The general denial puts in issue only issuable facts, and where, in an action to enforce a mechanic's lien, the complaint alleges that the defendant has or claims an interest in the land which is subject to the lien, this allegation is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien. *Elder v. Spinks*, 53 Cal. 293.

¹² *Hassett v. Curtis*, 20 Neb. 162, 29 N. W. 295. The defendant, under the general denial, is not confined to negative proof in denial of the facts, independent of

erty.¹³ Under general denial defendant has been allowed to show that he furnished part of the materials,¹⁴ or that the contract has not been performed,¹⁵ or is not executed as required by law.¹⁶

§ 254. Variance between pleadings and papers necessary to perfect lien.—Under most of the statutes the plaintiff is entitled to a lien only where he has given certain notices or filed certain claims, or performed certain other conditions required by the statute. The proper performance of these acts are conditions precedent upon which rests the right to the lien, and it is necessary that the petition contain averments that are in accord with these necessary conditions precedent. But a variance between them will not prevent a recovery unless it is a material one. Thus, the fact that the property is not described in the same terms in the petition as in the statement, will not amount to a fatal variance, provided it can be identified to be the same.¹ The variance has been held fatal in cases where the lien account set out a lump sum on one house and

those alleged in the complaint and inconsistent therewith. *Jeffersonville Water-Supply Co. v. Ritter*, 146 Ind. 521, 45 N. E. 697.

¹³ *Cornell v. Matthews*, 27 N. J. L. 522. The validity of a subcontractor's mechanic's lien is not put in issue by a plea of "no lien and non-assumpsit." *Thorn Bros. v. Shields*, 8 Pa. Dist. 129.

¹⁴ *Close v. Clark*, 16 Daly (N. Y.) 91, 9 N. Y. Supp. 538.

¹⁵ *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331.

¹⁶ *Security Mortgage & Trust Co. v. Caruthers*, 11 Tex. Civ. App. 430, 32 S. W. 837. Matters raised on reply, can be proved the same as if raised on answer. *Banks v. Moshier*, 73 Conn. 448, 47 Atl. 656.

¹ *California*.—*Brunner v. Marks*, 98 Cal. 374, 33 Pac. 265.

Massachusetts.—*Rice v. Nantasket Co.*, 140 Mass. 256, 5 N. E. 524; *Bristow v. Evans*, 124 Mass. 548.

Michigan.—*Hannah, &c., Mercantile Co. v. Hartzell*, 125 Mich. 177, 84 N. W. 52, 7 Det. Leg. N. 470.

Missouri.—*Stone v. Taylor*, 72 Mo. App. 482.

Oregon.—*Joshua Hendy Mach. Works v. Pacific Cable Const. Co.*, 24 Ore. 152, 33 Pac. 403

There is no variance between a notice of a mechanic's lien and a petition to enforce it because the land is described in one as "lot No. 4, in K's addition," and

the petition alleged a lump sum on three houses;² where the contracting parties were not the same, and the defect was not corrected in time,³ and where the claim set forth a contract to deliver at reasonable market rates and the petition set out an express contract to pay a fixed price.⁴ But a variance would not be held fatal where there is such resemblance between the averments of the claim as filed and those contained in the petition that no one is prejudiced thereby.⁵ All the papers should be construed together in determining whether there is a variance or not.⁶

as "lot No. 4, in K's Third Addition," in the other, since the one series of numbering may include all the lots. *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797. If the court with the judicial knowledge it has can identify the same it is sufficient. *White v. Stanton*, 111 Ind. 540, 13 N. E. 48. In the notice of a mechanic's lien, lot 9 was by mistake named, instead of lot 11; but the complaint referred to the mistake, and alleged that the only building built for or owned by defendants was on lot 11, instead of lot 9, and could be easily identified by the description in the notice. The complaint was good. *Newcomer v. Hutchings*, 96 Ind. 119.

² *Poppert v. Wright*, 52 Mo. App. 576.

³ *Lelegne v. Schwarzler*, 67 How. Pr. (N. Y.) 130, 10 Daly (N. Y.) 547.

⁴ *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167.

⁵ *California*.—*Brunner v. Marks*, 98 Cal. 374, 33 Pac. 265; *Reed v.*

Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

Indiana.—*Newhouse v. Morgan*, 127 Ind. 436, 26 N. E. 158.

Ohio.—*Kunkle v. Reeser*, 5 Ohio N. P. 401.

Utah.—*Culmer v. Clift*, 14 Utah 286, 47 Pac. 85.

Wisconsin.—*North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

Time and the amount claimed immaterial. *Badenoch v. Hoffman*, 50 Ill. App. 512. Where the complaint states the whole amount of labor and materials furnished, and the certificate states only the balance due, the variance is immaterial. *Nicols v. Culver*, 51 Conn. 177. A lien account showing that part of the materials furnished were of the agreed value of \$2,585, and part of the reasonable value of \$110 is not inconsistent with a complaint alleging that the goods were of the agreed and reasonable value of \$2,985. *Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285.

⁶ *Twitchell v. Devens*, 45 Mo. App. 283.

§ 255. **Variance between averments and proof.**—In the previous section we have referred more particularly to the variance that may be presented between the averments in the petition and the allegations that were contained in a statement or condition precedent that was required to be performed in order that the right to the lien might exist. In this section we will treat more especially of the variance between the pleadings and the proof or evidence that may be offered from other sources. The rule is a familiar one that the proof must correspond with the averments or the allegations in the pleadings.¹ But the variance to have the effect of defeating the recovery must be a material variance; such a one as misleads the opposite party.² There can be no variance

¹ *Trueblood v. Shellhouse*, 19 Md. App. 91, 49 N. E. 47; *Longland Brick Co. v. Arnold*, 18 R. 455, 28 Atl. 801. Petition avers mmp job for \$185; proof shows ice fixed at \$125; variance. *Pelon v. Schultz*, 23 Ill. 599. Pelon avers work done for conctor; proof shows done direct for owner; variance. *La Pasta Well*, 20 Misc. Rep. (N. Y.) 554, N. Y. Supp. 275. "Owner" and ntractor" not the same. *Hauptman v. Halsey*, 1 E. D. Smith (N. 668. "Verbal" and "written tract" a variance. *Pierce v. nes*, 106 Ill. App. 241. Failure prove ownership. *Munster v. le*, 50 Ill. App. 672. A vace between the record and evidence as to the value of materials furnished and the in which they were purchased and furnished, is immaterial. *Reed v. Norton*, 90 Cal. 590, ac. 767, 27 Pac. 426. Notice with owner, not the same as

notice filed with clerk of court. *Baumbach Co. v. Laube*, 99 Wis. 171, 74 N. W. 96. Husband and wife not same. *Jennings v. Huggins*, 125 Ga. 338, 54 S. E. 169.

² *California*.—*McClain v. Hutton*, 131 Cal. 132, 63 Pac. 182; *Coss v. McDonough*, 111 Cal. 662, 44 Pac. 325.

Indiana.—*Kealing v. Voss*, 61 Ind. 466.

Massachusetts.—*Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110.

Oregon.—*Osborn v. Logus*, 28 Ore. 302, 42 Pac. 997.

Washington.—*Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712.

On or about August 1, 1901, and proof of June 15, 1901, no variance. *Toan v. Russell*, 111 Ill. App. 629. A lien claim for material furnished for a "one-story refrigerating machine building and boiler house" is not at variance with proof that there were two buildings on the ground, where it is shown that they were

as to such matters as do not require proof.³ Objection should be made at the time the evidence is introduced, so that the party may obtain leave to amend.⁴ The evidence introduced on trial must establish the contract and its terms as alleged in the petition.⁵ But slight discrepancies as to the amounts

so substantially connected as to make but one building, and that there could be no mistake as to the identity of the structure. *Peterman v. Milwaukee Brewing Co.*, 11 Wash. 199, 39 Pac. 452. A variance of four days between the lien statement and the proof, as to the day on which the claimant completed his work, the statement being filed within the prescribed period of time in any event, is immaterial. *Althen v. Tarbor*, 48 Minn. 18. In a suit to enforce a mechanic's lien against defendant as owner of the land, proof that he was owner of the building with a right to remove, and tenant for years of the land, held not to show a fatal variance. *McCarty v. Burnett*, 84 Ind. 23.

³ *Wisconsin*.—*Red Pressed Brick Co. v. St. Peter St. Imp. Co.*, 46 Minn. 231, 48 N. W. 1022.

⁴ *Akers v. Kirk*, 91 Ga. 590, 18 S. E. 366.

⁵ *California*.—*Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Eaton v. Maletesta*, 92 Cal. 75, 28 Pac. 54.

Illinois.—*Belanger v. Hersey*, 90 Ill. 70; *Randolph v. Onstott*, 58 Ill. 52; *Austin v. Wohler*, 5 Ill. App. 300.

Massachusetts. — *Wilder v. French*, 75 Mass 393.

Missouri.—*Jodd v. Duncan*, 9 Mo. App. 417.

"Reasonable value" not same as fixed price. *Wilson v. Hind*, 113 Cal. 357, 45 Pac. 695. \$3.50 per day, not same as reasonable price, which proof showed to be \$2.84. *Jones v. Shuey (Cal.)*, 40 Pac. 17. Contract made with "husband and wife" not supporting evidence of contract with husband alone. *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775. "Agreed price" and no price agreed upon, a variance. *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195. No time for payment, and evidence showing payment to be within fixed time; variance. *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273. A party cannot make one case by his pleading and another by his evidence. *Bush v. Connelly*, 33 Ill. 447. In an action by a subcontractor, the complaint alleged a performance of the contract by the contractor. It was proper to exclude evidence to show a substantial performance, consisting of a completion by the owner according to a provision in the building contract providing therefor on failure of the contractor to do so. *Beecher v. Schuback*, 158 N. Y. 687, 53 N. E. 1123. A complaint alleged that plaintiff was to receive 5 per cent. of the total cost of the

due,⁶ or as to the time of delivery of material are not fatal where no one is misled.⁷ But if the petition avers that the contract was made with two, and the evidence shows that it was made with one, the variance will be fatal,⁸ unless it can be shown that, in fact, all the parties are liable.⁹ A petitioner cannot abandon the averments of the contract and recover on a quantum meruit.¹⁰

§ 256. **Evidence—Rules and presumptions.**—The general rules of evidence in actions of foreclosure of mechanics' liens are the same as those in actions generally of like character. Here as in other cases when a certain condition of affairs is shown to exist certain other matters will be presumed without any proof. Hence if it is shown that a material man furnished certain material for a person whom he knows is erecting a building it will be presumed that the materials were furnished for that building.¹ And if it is shown

building for services as superintendent. The evidence showed that he was to receive \$25 a week and the 5 per cent. commission. A fatal variance. *Fisch v. Hanna*, 47 Pac. 303, 8 Colo. p. 471.

Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Erection of barn in addition house, etc. *Reiss v. Scherner*, Ill. App. 84; *Wrought-Iron Pipe Co. v. York Mfg. Co.*, 11 Ark Leg. Rec. (Pa.) 45.

Wolfley v. Hughes, 8 Ariz. 71 Pac. 951; *San Pedro Lumber Co. v. West*, 2 Cal. App. 86 Pac. 993.

Harrison v. Hawkins Lumber 111 Ala. 308, 20 So. 427; *McV v. Miltenberger*, 75 Mo. 346; *Thurston v. Schroeder*, I. 272; *Cocciola v. Wood-*

Dickerson Supply Co. (Ala.), 44 So. 541.

⁹ That a joint contract was alleged with the owner of a building and a contractor, under which plaintiffs claimed to have furnished materials, while the evidence showed only a several contract with the owner, cannot be urged by the owner as a defense, since in either event he is liable. *Kruger v. Braender*, 3 Misc. (N. Y.) 275, 23 N. Y. Supp. 324. Co-partners and co-tenants same. *Merritt v. Crane Co.*, 126 Ill. App. 337, judgment modified, 225 Ill. 181, 80 N. E. 103.

¹⁰ *Carroll v. Craine*, 9 Ill. 563; *Beattys v. Searles*, 74 App. Div. (N. Y.) 214, 77 N. Y. Supp. 497.

¹ *Kunkle v. Reeser*, 5 Ohio N. P. 401. See Dec. & Am. Dig. tit. Mechanics' Liens, § 279.

that he otherwise complied with the statutes, as by making the contract with the proper person, it will be presumed that he furnished the materials on the credit of the building.² And if a person is shown to have been the owner of the property upon which the lien is sought to be foreclosed, a short time before the attachment of the lien, he will be presumed to be the owner at the time the lien attached.³ Persons holding the legal title are presumed to have the power to contract for the lien.⁴ If it is shown that the materials were furnished at different times at appropriate stages of the building operations, it will be presumed that they were furnished under one continuous contract.⁵ But this will not be true if the work is distinct and separate in its nature,⁶ or if an unusual length of time has intervened between the items. However, evidence may be introduced to show that although a considerable length of time intervenes, or the different items were of a distinct character, yet all were furnished under one contract.⁷ The mere acceptance of a promissory note will not raise a presumption that the lien is waived,⁸ or that the time for payment of materials will be extended to that time.⁹ The

² *Rider-Ericsson Engine Co. v. Fredericks*, 25 Pa. Super. Ct. 72.

³ *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546.

⁴ When trustees holding the legal title to land for the members of a religious society, and having power, with the consent of the society, to charge the property with debts, cause a church to be erected on the land, it is presumed, in an action to foreclose a mechanic's lien upon the property for material furnished in the erection of the church, the society consented to the erection of the building. Har-

risburg Lumber Co. v. Washburn, 29 Ore. 150, 44 Pac. 390.

⁵ *Kizer Lumber Co. v. Mosley*, 56 Ark. 554, 20 S. W. 409.

⁶ *Page v. Bettes*, 17 Mo. App. 366.

⁷ *Hansen v. Kinney*, 46 Neb. 207, 64 N. W. 710; *Buchanan v. Selden*, 43 Neb. 559, 61 N. W. 732; *Cornell v. Kime* (Neb.), 89 N. W. 254.

⁸ Waiver, see §§ 173 et seq.

⁹ Therefore, where material men took from a contractor his notes, receipting for them as "In full for brick delivered to a church," against which they filed their lien, and proceeded upon it

statute having been complied with as to the performance of conditions required to create a lien, the presumption is that the plaintiff's claim is made under the mechanic's lien law.¹⁰

§ 257. Evidence—Burden of proof.—It is a well-settled rule that the burden of proof rests upon the plaintiff in all matters in which he holds the affirmative and upon the defendant upon any matters which he affirms by way of defense.¹ Among other things the burden is on the plaintiff to show that there is a debt due,² notwithstanding the law is liberally construed,^{2a} that the claim is for work done or

before the notes became due, and it was found by the jury that the notes were not received in satisfaction of the debt, it was held that a binding agreement, that the plaintiffs were not to sue for the original debt until the notes matured, could not be implied from the transaction. *Shaw v. First Associated Reformed Presbyterian Church*, 39 Pa. St. 226.

¹⁰ *Wagner v. McMillen*, 72 Wis. 7, 39 N. W. 777.

Arkansas.—*Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583.

Missouri.—*Hormann v. Wirtel*, Mo. App. 646.

New York.—*Lawrence v. Congregational Church of Greenfield, Long Island*, 164 N. Y. 115, 58 N. 24.

Pennsylvania.—*Noar v. Gill*, 111 488, 4 Atl. 552.

West Virginia.—*United States Pipe Co. v. Spencer*, 61 W. 191, 56 S. E. 345.

New contract.—Where, in an action to enforce a lien for fur-

nishing brick under a contract, the defendant pleads a new contract substituted for the original one, the burden is on him to prove it. *Kruegel v. Kitahen*, 33 Wash. 214, 74 Pac. 373. Plaintiff bound by his admissions as to contract for price of material. *Yaukey v. Buckman*, 18 Pa. Super. Ct. 378.

Exceeds amount.—It is not necessary for a lien claimant to show that the quantity of land on which the lien is claimed is within the statutory limit. If the defendant claim that it exceeds that limit, he must show it, and the court must then carve out a tract within the limit, and confine the lien to it. *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485. *Prima facie* case. *Long v. Abeles & Co.*, 77 Ark. 156, 93 S. W. 67.

² *Haswell v. Goodchild*, 12 Wend. (N. Y.) 373.

^{2a} *Brant v. City of New York*, 186 N. Y. 599, 79 N. E. 1101; *Brandt v. Burke*, 110 App. Div. (N. Y.) 396, 97 N. Y. Supp. 280.

materials furnished on or about a certain date,³ and that the lien statement was properly made and filed pursuant to statute,⁴ and within the required time.⁵ The burden is on the plaintiff to establish all jurisdictional facts.⁶ If the plaintiff avers that the contract was made by an agent he must show that fact.⁷ Where the statute provides a method for the owner to pursue the burden is on the owner to show that he has complied with the statute.⁸ So where an action is brought by a subcontractor, burden is upon him to prove all facts upon which his rights exist.⁹ It will not be sufficient

³ *Eastmore v. Bunkley*, 113 Ga. 637, 39 S. E. 105; *Darlington v. Eldridge*, 88 Mo. App. 525. In a proceeding to enforce a mechanic's lien against several different blocks of houses, separated by public streets, the burden is on claimant to prove all the facts necessary to make good his lien against any or all of the property. *Bradley Co. v. Gagham*, 208 Pa. 511, 57 Atl. 985.

⁴ *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332; *Landvoight v. Melovich*, 1 App. (D. C.) 498; *Noar v. Gill*, 111 Pa. 488, 4 Atl. 552.

⁵ *Wilson v. Wilson*, 51 Md. 159; *Darlington v. Eldridge*, 88 Mo. App. 525; *Wees v. Elbon*, 61 W. Va. 380, 56 S. E. 611; *Foley v. Coon*, 41 Colo. 432, 93 Pac. 13.

⁶ *McGlaufflin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

Prima facie case as to amount due.—After the plaintiff, who is a subcontractor, has shown that the work has been performed according to the contract, the amount stipulated by the contract is held prima facie to be due the con-

tractor. The onus of proving that it is not due rests with the defendant. *Rudd v. Davis*, 1 Hill. (N. Y.) 277. The burden is on plaintiff to show compliance specifying the steps required to initiate a lien. *Boland v. Webster*, 126 Mo. App. 591, 105 S. W. 34.

⁷ One claiming a mechanic's lien for services rendered at the request of another than the owner has the burden to prove such other's agency. The presumption arising from the owner's knowledge of the work which was to be, and was done, and from her furnishing part of the funds to pay for it, may be rebutted. *Shinn v. Matheny*, 48 Ill. App. 135; *Anderson v. Volmer*, 83 Mo. 403; *Title Guarantee & Trust Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271.

⁸ Under Laws, 1889, c. 200, § 5, the onus of proof, as to serving or posting notice to protect his property from mechanics' liens, is on the owner. *McCausland v. West Duluth Land Co.*, 51 Minn. 246, 53 N. W. 464.

⁹ *Wookey v. Slemmons*, 65 Ill. App. 553; *Madden v. Lennon*, 23

to assume that necessary conditions have been complied with.¹⁰ An owner completing a building under a contract allowing him to do so on default of the contractor and then deduct the cost, is not obliged to show a completion according to specifications, in an action by a subcontractor,¹¹ but must show actual cost of completing same.¹²

§ 258. Evidence—Admissibility—General rule—Ownership of premises.—Mechanics' lien statutes, as a general rule, do not prescribe the kind of evidence that is necessary to establish or defeat the cause of action; this matter is left to be determined by the general laws of the forum in which the action is pending.¹ If a matter is immaterial or irrelevant, it cannot be shown.² But whatever tends to establish a plain-

fisc. (N. Y.) 704, 52 N. Y. Supp. ; Camden Wood-Turning Co. v. Malcolm, 190 Pa. St. 62, 42 Atl. 58. Must show existing indebtedness. Merritt v. Crane Co., 26 Ill. App. 337. Architect's certificate as to completion. Chicago Lumber & Coal Co. v. Garner, 132 Iowa 282, 109 N. W. 780; Knudsen-Hacob Co. v. Brandt, 44 Wash. 68, 87 Pac. 43.

¹⁰ Where lumber was furnished plaintiff to a contractor, who was at the time building defendant's house, and two others, the evidence of plaintiff that he bought about \$210 worth of lumber, corresponding to that paid by him to the contractor, as used in defendant's house, does not justify a finding that 100 worth of lumber was so paid. Johnson v. Simmons, 123 Mo. 564, 26 So. 650.

¹¹ Beecher v. Schuback, 158 N. E. 387, 53 N. E. 1123. Burden is on the owner to establish what

damage, if any, should be awarded him in mitigation of the amount claimed by way of lien. Miller v. Calumet Lumber & Mfg. Co., 22 Ill. App. 56.

¹² Martin v. Flahive, 112 App. Div. (N. Y.) 347, 98 N. Y. Supp. 577.

¹ Church v. Davis, 9 Watts (Pa.) 304. See Dec. & Am. Dig. tit. Mechanics' Liens, § 280.

² For materials furnished the lessee, the amount of rent due the lessor by the lessee is not admissible in evidence. Rothe v. Bellingrath, 71 Ala. 55. In an action by a contractor, evidence is not admissible as to the difference between the value of the building as it was finished and as it should have been finished, where there was evidence that the defects could be remedied. Brunold v. Glasæer, 53 N. Y. Supp. 1021, 25 Misc. Rep. (N. Y.) 285. Where the complaint did not allege that the contractor had

tiff's cause of action,³ or defendant's defense, is admissible,⁴ unless the opposite party by his plea has admitted it to be true.⁵ For the purpose of showing a subsequent purchaser's relation to the case, he may be asked if he has not by reason of the lien refused to pay for the premises.⁶ Where a judgment has been rendered declaring a lien on the property, the contractor can not object to the admission of the same in an action against him by the owner for money paid by the owner by virtue of such judgment.⁷ Upon the question of ownership it is competent to put in evidence the lease made to defendant during the time the materials were furnished, provided, of course, the lease may affect the liability of the owner.⁸ But evidence of ownership at time of trial is irrelevant, as it is the ownership which exists at the time the lien attaches that generally affects the right of recovery.⁹ But there may be instances when this evidence would be competent, as where the owner has sold the premises and the purchaser has assumed the lien or where the property had been fraudulently conveyed, then the petitioner may treat either the grantor or the grantee as the owner, and evidence

promised to pay a subcontractor's indebtedness to his workmen, nor were any facts alleged on which to base a finding of such a promise, evidence of such a promise was inadmissible. *Murphy v. Hardiman*, 99 N. Y. St. 6, 112 App. Div. 690.

³ *Ottiwell v. Watkins*, 15 Daly (N. Y.) 309, 6 N. Y. Supp. 518. Was not a mechanic. *Gaskill v. Davis*, 66 Ga. 665. Where defendant's inspector and time-keeper, in the course of business, gave statements to plaintiff of the date and amount of each day's work, such statements were admissible to show when plaintiff

did the work, and that his suit was not barred by the statute of limitations. *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

⁴ *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712; *Thayer v. Williams*, 65 Mo. App. 673.

⁵ *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512; *Linck v. Johnson*, 134 Cal. xix, 66 Pac. 674.

⁶ *Goulding v. Smith*, 114 Mass. 487.

⁷ *Menefee v. Beverforden*, 95 Mo. App. 105, 68 S. W. 972.

⁸ *Wilson v. Merryman*, 48 Md. 328.

⁹ *Coats v. Dickenson*, 5 Alb. L. J. (N. Y.) 333.

will be competent to show that he was the owner either at the time the lien attached or at the time of the foreclosure.¹⁰ If there is a question whether the lien covers two lots, evidence of the action of the owner in his use of the lots will be competent.¹¹

§ 259. **Evidence—Kind and value of work—Contract.**—If the plaintiff introduces evidence that the work is well done, the defendant may show that it was not well done,¹ and he may show that plaintiff charges for more material than could have gone into the building.² Evidence is sometimes admissible of work not covered by the lien where such evidence makes clear the nature of the work for which the lien is sought.³ However, under some statutes such evidence might not be competent if the material was actually purchased for the building.⁴ Where the contract is abandoned, the defendant may show the value of the work, taking into consideration the contract price and the sum required to complete the contract.⁴ The lien statement is admissible even as against the owner to show the value of the materials furnished where the witness who ordered the goods testified that it was a correct statement of the account.¹⁰ If the materials are of such a kind that a careful and skillful man acquainted with the building for which they were designed, might properly believe that they could be used in its construction, and if, in fact, they

¹ *Amidon v. Benjamin*, 126 N. E. 276.

² *Pollock v. Morrison*, 176 N. E. 83, 57 N. E. 326.

³ *Hagman v. Williams*, 88 Cal. 25 Pac. 1111; *Thorn v. Ingersoll*, 1 Phila. (Pa.) 322, 5 Clark

⁴ *McKinson College v. Church*, 169, 9 Leg. Int. (Pa.) 46.

⁵ *Stevenson v. Woodward*, 8 App. 754, 86 Pac. 990.

⁶ *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022.

⁷ *MacDonald v. Hayes*, 132 Cal. 490, 64 Pac. 850.

⁸ *Mooney v. Peck*, 49 N. J. L. 232, 12 Atl. 177; *Cattanach v. Ingersoll*, 1 Phila. (Pa.) 285, 5 Clark (Pa.) 144, 11 Pa. L. J. (Pa.) 345; *Horgan v. McKenzie*, 17 N. Y. Supp. 174. "Phillips, in his work on *Mechanics' Liens* (section 204), states the rule on this sub-

could be usefully applied in its construction, then the material man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction.¹¹ Evidence as to the reasonable value of the materials furnished is incompetent where the same is fixed by contract,¹² but if the finding should be only for the contract price, it is harmless error to admit the evidence.¹³ The fact that a certain person made calculations as to the amount of work done, will not authorize the admission of such estimates by a witness to whom they were dictated.¹⁴ The original contract is generally admissible,¹⁵ but if it is admitted to be correctly set out in the petition,

ject as follows: 'The owner, when the contract is not made immediately by himself or his duly authorized agent, but by his contractor, may show that the price agreed to be paid by the contractor was beyond the fair market value at the time; but if there is no evidence to show that the materials furnished by a sub-contractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price. The owner, when sued by a subcontractor, would be able to impeach the contract only for fraud or mistake. The contract in either case is admissible in evidence.' He cites in support of this proposition: *Cattanach v. Ingersoll*, 1 Phila. (Pa.) 285; *Hilliker v. Francisco*, 65 Mo. 598; *Miller v. Whitelaw*, 28 Mo. App. 639." *Charles v. E. F. Hallack Lumber & Mfg. Co.*, 32 Colo. 283, 43 Pac. 548.

¹¹ *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675.

¹² *Murphy v. Fleetford*, 30 Tex. Civ. App. 487, 70 S. W. 989.

¹³ *Reid v. Berry*, 178 Mass. 260, 59 N. E. 760.

¹⁴ *Cook v. Gallatin R. Co.*, 28 Mont. 340, 72 Pac. 678. A contractor's lien was defended on the ground that in doing the plumbing he had substituted inferior material, and the owner testified that he had been compelled to pay out a considerable sum for repairs thereto, and had suffered much damage therefrom. The contractor's testimony as to what would be the proper cost of keeping the plumbing in repair was admissible, both as directly bearing on the issues involved and to impeach the owner. *Schultze v. Goodstein*, 82 App. Div. (N. Y.) 316, 81 N. Y. Supp. 946.

¹⁵ *Gattanach v. Ingersoll*, 1 Phila. (Pa.) 285; *McDermott v. Class*, 104 Mo. 14, 15 S. W. 995.

it will not be error to refuse its admission.¹⁶ Of course, if the contract is in writing, parol evidence is not admissible to vary its terms.¹⁷ It may be shown, however, by parol that the character of the building was changed from that contemplated at the time the contract was made.¹⁸ If the owner is to be charged by merely consenting to the work being done, then evidence of all matters tending to prove his knowledge of the erection of the building is competent.¹⁹ But evidence that a person was employed on one job is inadmissible to show that he was employed on another job.²⁰ Where, under the statutes, the contractor acts as the agent of the owner, evidence of the nature of the contractor and subcontractor's contract is admissible, even though the owner knew nothing of it.²¹ On the question whether the contract is entire or separable, receipts given for money during delivery of the material or the furnishing of labor are admissible.²²

¹⁶ *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 28 Ill. App. 371.

¹⁷ *Justice v. Myers*, 68 Minn. 481, 71 N. W. 667.

¹⁸ *Brown v. Edward P. Allis Co.*, 98 Wis. 120, 73 N. W. 656.

¹⁹ *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. 616; *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907.

Husband agent of wife.—Laws Minn. 1885, ch. 46, provides for a lien for labor or material furnished by or with the knowledge and consent of a married woman, who is the owner of the property benefited thereby, upon the order of her husband, and that such knowledge and consent shall be sufficient to establish that such husband acted therein as the agent of the wife. Where a husband contracted to have the plumbing done in a house being

constructed by the wife, and owned by her, it was error to exclude proof that the wife saw and conversed about the plumbing while it was being done. *McCarthy v. Caldwell*, 43 Minn. 442, 45 N. W. 723. It is competent to ask him whether he sold the property for his wife and as to what he did with the purchase money, and as to who employed men to do certain work on her property. *Saunders v. Tuscumbia Roofing & Plumbing Co.*, 148 Ala. 519, 41 So. 982.

²⁰ *Miller v. Barroll*, 14 Md. 173.

²¹ *Treusch v. Shryock*, 51 Md. 162.

²² *Pratt v. Campbell*, 24 Pa. 184. Evidence that the contractor had purchased some materials of another materialman did not show that plaintiff had not carried out his contract. *San Pedro Lumber*

§ 260. Evidence—Book accounts—Lien claim—Pleadings.

—Where the plaintiff's lien rights depend upon whether there is something due the contractor from the owner at the time it is sought to establish the lien, then the condition of accounts between owner and contractor becomes a material one and the evidence relating thereto is admissible.¹ Book accounts, together with other admitted or known facts,² are generally admissible³ to show the existence⁴ or non-existence of the debt,⁵ as well as the application of payments made.⁶ In the absence of evidence showing the particular one of several buildings for which the materials sold and charged in joint account, were furnished, the account is not admissible.⁷ Other evidence is admissible to show to which building the material was applied.⁸ And in cases where the account shows joint items it may be explained for what purpose the account was thus made, and that really the claim is against a certain one only.⁹ The contractor's statement to a subcontractor as

Co. v. West, 2 Cal. App. 757, 86 Pac. 993.

¹ Lind v. Braender, 15 Daly (N. Y.) 370, 7 N. Y. Supp. 664; Parsley v. David, 106 N. Car. 225, 10 S. E. 1028. Waiver of claim for damages. Rhodes v. Jones, 26 Tex. Civ. App. 568, 64 S. W. 699. Certificate of person, agreed on as to amount due. Malone v. Mayfield, 13 Tex. Civ. App. 548, 36 S. W. 148.

² McCartney v. Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

³ Book of original entries.—The plaintiff's book of original entries is competent evidence of the items and the amount of the debt claimed, and he may show by the evidence the other facts which entitle him to recover. Noar v. Gill, 111 Pa. 488, 4 Atl. 552.

Letter inadmissible.—A letter from the architect to plaintiff, stating that the latter was ordered by defendant to cease work, is inadmissible without proof that defendant authorized such letter. Guggolz v. Callan, 25 Misc. (N. Y.) 762, 54 N. Y. Supp. 149.

⁴ McQuaide v. Stewart, 48 Pa. St. 198.

⁵ Creasy v. Emanuel Reformed Church, 1 Pa. Super Ct. 372.

⁶ McQuaide v. Stewart, 48 Pa. St. 198.

⁷ Brown v. Kolb, 43 W. N. C. 26, 8 Pa. Super Ct. 413.

⁸ Chambers v. Yarnall, 15 Pa. 265.

⁹ Trammell v. Hudmon, 86 Ala. 472, 6 So. 4.

to why he charged a credit to another account, is inadmissible against other lien claimants, it being hearsay as to them.¹⁰ If an account shows a charge against one person and another is sought to be charged on the ground that the materials were used for the improvement of his premises, a note given by the one charged may be introduced as showing the correctness of the charge and to show on whose credit the charge was made.¹¹ The lien statement made and filed as the law requires¹² is admissible.¹³ However, if the correctness of the claim is disputed, then this fact must be shown by other evidence.¹⁴ A memorandum on the back of the statement itself and not recorded is not admissible.¹⁵ But variances may be explained,¹⁶ and inconsistencies shown by a defendant.¹⁷ As a general rule, the pleadings are admissible as evidence.¹⁸ But they are not conclusive, and unless

¹⁰ *Green Bay Lumber Co. v. Thomas*, 106 Iowa 420, 76 N. W. 749. *Co. v. Nickerson*, 13 Idaho 682, 93 Pac. 24.

¹¹ *Wright v. Hood*, 49 Wis. 235, 5 N. W. 488.

¹² *Jennings v. Neale*, 52 How. Pr. (N. Y.) 232; *Greene v. F'innell*, 22 Wash. 186, 60 Pac. 144.

¹³ *New Ebenezer Assn. v. Gress Lumber Co.*, 89 Ga. 125, 14 S. E. 892; *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108. It was relevant to an issue in the cause, viz.; the right of the plaintiff to a lien. The plaintiff had filed the notice in due time, and in proper terms, and the record was evidence tending to prove it. *Merritt v. Pearson*, 58 Ind. 385.

¹⁴ *Weaver v. Sheeler*, 118 Pa. 634, 12 Atl. 558.

¹⁵ *Lawson v. Coates*, 56 Ga. 379. Memorandum inadmissible unless relevant. *Valley Lumber & Mfg.*

¹⁶ On an issue as to the good faith of a contractor in stating the amount due, in the certificate for a mechanic's lien, where he testified that he kept no account of the time a subcontractor worked, which was included as one of the items on account of his time, written up and given the contractor by the subcontractor, was admissible. *Monaghan v. Goddard*, 173 Mass. 468, 53 N. E. 895.

¹⁷ A mechanic's lien, signed and sworn to by plaintiff, which contains declarations inconsistent with his claim, is admissible, in behalf of defendant in an action on such claim. *Guggolz v. Callan*, 25 Misc. Rep. (N. Y.) 762, 54 N. Y. Supp. 149.

¹⁸ *Tracy v. Rogers*, 69 Ill. 662; *Garrett v. Stevenson*, 8 Ill. 261;

the parties had been properly notified by personal service, judgment can not be taken without other evidence.

§ 261. **Evidence—Weight and sufficiency.**—Reviewing courts do not set aside a finding as being against the weight of the evidence, unless it is manifestly so, but they will not hesitate to do so where there is no evidence to support the claim for a lien.¹ If, however, the evidence is merely conflicting the verdict of the jury or decision of the *nisi prius* court will be allowed to stand.² Where the plaintiff shows that the money was due and payable,³ and that he has delivered the materials at the building,⁴ and that he filed his statement within the required statutory time,⁵ and performed his con-

Kimball v. Cook, 6 Ill. 423; **Van Billiard's Adm'rs. v. Nace**, 1 Grant Cas. (Pa.) 233.

¹ **Georgia.**—**Foote v. Kendall**, 113 Ga. 946, 39 S. E. 303.

Illinois.—**Schmelzer v. Chicago Ave. Sash & Door Mfg. Co.**, 85 Ill. App. 696.

Kentucky.—**Finch v. Redding**, 43 Ky. 87.

Michigan.—**Brennan v. Miller**, 97 Mich. 182, 56 N. W. 354.

Minnesota.—**McDonald v. Ryan**, 39 Minn. 341, 40 N. W. 158.

Missouri.—**Boland v. Webster**, 126 Mo. App. 591, 105 S. W. 34.

Washington.—**Heald v. Hodder**, 5 Wash. St. 677, 32 Pac. 728. Did not show contract was performed. **Tanzley v. Lampkin**, 113 Ga. 1007, 39 S. E. 473. Failure to show substantial compliance with contract. **Smith v. Ruggiero**, 173 N. Y. 614, 66 N. E. 1116. A verified account filed to secure a mechanic's lien for materials furnished is no evidence of the delivery of the material. **Searle &**

Chapin Lumber Co. v. Jones (Neb.), 114 N. W. 783. See Dec. & Am. Dig. tit *Mechanics' Liens* § 281.

² **McClain v. Hutton**, 131 Cal. 132, 63 Pac. 182; **Jacoby v. Scougale**, 26 Ill. App. 46.

³ **Doughty v. Devlin**, 1 E. D. Smith (N. Y.) 625.

⁴ **Allen v. Elwert**, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54. The evidence showed that the manufacturer had shipped the material to the contractor, on behalf of the local dealer, and that similar material went into the house. It was not contended that it was bought elsewhere. It was sufficient to establish the local dealer's lien for such material. **Frudden Lumber Co. v. Kinnan**, 117 Iowa, 93, 90 N. W. 515; **Darlington Lumber Co. v. Harris**, 107 Mo. App. 148, 80 S. W. 688; **Noyes v. Smith** (Tex. Civ. App.), 77 S. W. 649.

⁵ **McLean v. Wiley**, 176 Mass. 233, 57 N. E. 347; **Western Iron Works v. Montana Pulp & Paper**

tract,⁶ the findings of the lower court in his favor will not ordinarily be disturbed.⁷ The mere preponderance of the evidence is sufficient.⁸ As a general rule, undenied averments of the petition are sufficient to sustain a finding for plaintiff.⁹ But if impeached by a cross-claimant, the cross-claimant will be entitled to a decree so far as the averments of his cross-petition show him entitled.¹⁰ Evidence that the person sought to be charged is in possession claiming ownership of the lots in

Co., 30 Mont. 550, 77 Pac. 413; Bankers' Building & Loan Assn. v. Williams (Neb.), 96 N. W. 655.

⁶ *Schultze v. Goodstein*, 82 App. Div. (N. Y.) 316, 81 N. Y. Supp. 946; *Smith v. Ruggiero*, 52 App. Div. (N. Y.) 382, 65 N. Y. Supp. 89. *Cline v. Shell*, 43 Ore. 372, 73 Pac. 12. Subcontractor did not perform contract. *MacKnight Flintic Stone Co. v. City of New York*, 176 N. Y. 586, 68 N. E. 1119, 78 App. Div. (N. Y.) 641, 79 N. Y. Supp. 521. In the absence of evidence of a contract between the owner of land and the alleged original contractor, one furnishing material to such contractor could not enforce a lien on the premises. *Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468. Evidence sufficient to sustain a finding of damages for poor material and workmanship in excess of the amount due on the contract. *Fletcher v. Sandusky*, 26 Ky. Law Rep. 1232, 83 S. W. 644.

⁷ *Haviland v. Pratt*, 9 Leg. Int. (Pa.) 98.

⁸ An instruction, in an action to foreclose a mechanic's lien on a homestead provided by a contract purporting to be acknow-

ledged by husband and wife, but which the answer denied was acknowledged by the wife, that the evidence establishing such defense must be clear and convincing, and that it must be clearly shown to the satisfaction of the jury that she did not acknowledge it, is erroneous, it being necessary for defendants to establish the fact by a preponderance of evidence only. *Mosen v. R. B. Spencer & Bro.*, 82 S. W. 1054 (Tex. Civ. App.)

⁹ *Carey-Lombard Lumber Co. v. Carrier*, 92 Ill. App. 269; *Hannah & Lay Mercantile Co. v. Hartzell*, 125 Mich. 177, 84 N. W. 52, 7 Det. Leg. N. 470.

¹⁰ **Evidence insufficient to establish fact indicated.**—That materials were furnished for certain building but must show they were used. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594. That notice was properly given. *Hill v. Kaufman*, 98 Md. 247, 56 Atl. 783.

Evidence sufficient to show fact indicated.—That mortgagee knew of arrangement to take notes, etc. *Kendall v. Fadder*, 199 Ill. 294, 65 N. E. 318. To show one entire

the petition described,¹¹ or that he occupied the house as a residence,¹² or that the property is assessed against him for taxation,¹³ or that there are no other lots except those in the complaint described in a certain town belonging to him,¹⁴ is generally held sufficient to justify a decree against the property.¹⁵ However, there must be sufficient evidence to

contract. *Hill v. Kaufman*, 98 Md. 247, 56 Atl. 783. To show value of property above homestead exemptions. *McAllister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887, 9 Det. Leg. N. 645. To show delivery of materials at certain date. *Lamb Lumber Co. v. Benson*, 90 Minn. 403, 97 N. W. 143. *Searle & Chapin Lumber Co. v. Jones (Neb.)*, 114 N. W. 783. To show that the party was entitled to a lien on the fee. *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, 69 S. W. 304. On cross-petition to foreclose a mechanic's lien, the verified account of items, with proof of amount of claim, is not sufficient to sustain a decree. *Urlau v. Ruhe*, 63 Neb. 883, 89 N. W. 427. To show certain amount remained undone when abandoned. *Miller v. Norcross*, 92 App. Div. (N. Y.) 352, 87 N. Y. Supp. 56. To show agent's authority; to show no agreement to cancel lien. *Hine v. Vanderbeek*, 56 App. Div. (N. Y.) 621, 67 N. Y. Supp. 801, 170 N. Y. 580, 63 N. E. 1118; *Lehretter v. Koffman*, 1 E. D. Smith (N. Y.) 664, Code R. (N. Y.) 284. To show separate contracts. *Smith v. Wilcox*, 44 Ore. 323, 74 Pac. 708. To show purchase of entire bill of goods. *Cline v. Shell*,

43 Ore. 372, 73 Pac. 12. To show delivery of material at certain date. *Forest Grove Door & Lumber Co. v. McPherson*, 31 Ore. 586, 46 Pa. 884. To show kind of building, etc., whether new or alteration. *Kelm v. McRoberts*, 18 Pa. Super. Ct. 167. To show forcible ejection of plaintiff. *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815. To show that action is based in entire contract. *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016. To show material was sold to be used in certain buildings. *Laev Lumber Co. v. Auer*, 123 Wis. 178, 101 N. W. 425. To show building was commenced according to certain plans. *Fitzgerald v. Walsh*, 107 Wis. 92, 82 N. W. 717. To submit matter to jury. *Johnson v. Iron Belt Min. Co.*, 78 Wis. 159, 47 N. W. 363.

¹¹ *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215; *Cole v. Barron*, 8 Mo. App. 509; *Foley v. Coon*, 41 Colo. 432, 93 Pac. 13.

¹² *Lewis v. Saylor*, 73 Iowa 504, 35 N. W. 601.

¹³ *Rohan Bros. Boller Mfg. Co. v. St. Louis Malleable Iron Co.*, 34 Mo. App. 157.

¹⁴ *Lombard v. Johnson*, 76 Ill. 599.

¹⁵ *Santa Cruz Rock Pav. Co. v. Lyons (Cal.)*, 43 Pac. 599.

show that the work or materials were furnished for the property sought to be charged in the lien.¹⁶ If there is no such evidence, then the action must fail.¹⁷ And if a lien itself depends upon the time when the work was commenced, this fact must be shown,¹⁸ but a trivial variance between the averments in the complaint and proof in this particular will not invalidate the lien.¹⁹

¹⁶ *Pease v. Thompson*, 67 Iowa 70, 24 N. W. 598. Articles not used and not fit, not included. *Battle Creek Lumber Co. v. Poland*, 150 Mich. 690, 114 N. W. 671, 14 Det. Leg. N. 866.

¹⁷ *Pollock v. Morrison*, 177 Mass. 412, 59 N. E. 80. The complaint described the property by metes and bounds. The notice of lien introduced as evidence described it by referring to the date and record of a certain deed of the premises. The answer admitted that the house was built on the land described in the complaint, but no evidence was introduced to show that the land described in the lien was the same as that described in the complaint. There was no evidence on which to establish a lien on the land in question. *Morehouse v. Collins*, 23 Ore. 138, 31 Pac. 295.

¹⁸ *Leftwich Lumber Co. v. Florence Mut. Bldg. Loan & Savings Assn.*, 104 Ala. 584, 18 So. 48.

¹⁹ *Schlinger v. Green*, 149 Cal. 752, 87 Pac. 626. Where the memorandum of contract was filed at 10:30 o'clock a. m., and it appeared that the work was commenced no earlier than 8 or 8:30 a. m. of the same day, the evidence

thereof being doubtful, and such work being of a trivial nature, a finding that the work commenced before said filing, will not be sustained. *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426. Sufficient to sustain case. *Union Lumber Co. v. Simon* 150 Cal. 751, 89 Pac. 1077; *Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Co.* (N. Mex.), 93 Pac. 706; *Maneely v. New York*, 119 App. Div. (N. Y.) 376, 105 N. Y. Supp. 976; *Gier v. Daiber*, 148 Mich. 190, 111 N. W. 773; 14 Det. Leg. N. 183; *Salter v. Goldberg*, (Ala.), 43 So. 571; *Guion v. Ryckman*, 77 Neb. 833, 110 N. W. 759; *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323; *Chicago Lumber, & Co. v. Garmer*, 132 Iowa 282, 109 N. W. 780; *Libbey v. Tidden*, 192 Mass. 175, 78 N. E. 313; *McLaughlin v. Sayle*, 190 Mass. 583, 77 N. E. 639; *Prince v. Neal-Millard Co.*, 124 Ga. 884, 53 S. W. 761; *Hahn v. Bonacum*, 76 Neb. 837, 107 N. W. 1001. Insufficient to sustain case. *Knudson-Jacob Co. v. Brandt*, 44 Wash. 68, 87 Pac. 43; *Drall v. Gordon*, 51 Misc. (N. Y.) 618, 101 N. Y. Supp. 171; *Central Planing Mill & Lumber Co. v. Betz*, 29 Ky. L. Rep. 252, 92 S. W. 591; *Miller v.*

§ 262. **Evidence—Completion of work—Consent of Owner—Indebtedness.**—Of course, if the lien depends for its efficacy upon the time of the completion of the work, this fact must be shown, and it is held that the structure is completed if it is occupied by the owner.¹ But a finding that it is completed is not justified where completion is interfered with by reason of a dispute between the owner and contractor,² or some condition remains to be performed.³ Generally all evidence which goes to establish the fact of such completion is admissible. If a mistake is made as to the date, this may be explained and the true date shown.⁴ The agreement or consent of the owner to the terms of the contract cannot be implied⁵; it must be proved.⁶ Plaintiff may be held, however, if there is sufficient evidence to show an agency,⁷ or raise an estoppel.⁸ Proof of knowledge, however, is not proof of

Isear, 99 N. Y. Supp. 869; Tommasi v. Bolger, 114 App. Div. (N. Y.) 838, 100 N. Y. Supp. 367.

¹ Joost v. Sullivan, 111 Cal. 286, 43 Pac. 896.

² Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

³ Washburn v. Kahler, 97 Cal. 58, 31 Pac. 741.

⁴ Harrisburg Lumber Co. v. Washburn, 29 Ore. 150, 44 Pac. 390.

⁵ Cowen v. Paddock, 137 N. Y. 188, 33 N. E. 154. Plaintiff testified that defendant employed him, but he made no definite statement of the manner of his employment, and admitted that he came to take charge of the work under contract with defendant's architect to superintend their buildings, including defendant's. Defendant denied having employed him, and was corroborated by the archi-

tects, who testified that the employment was by them, that they were to pay him, and defendant only to make up to them a certain amount of his wages. A judgment for plaintiff was unwarranted. Cadwell v. Brackett, 2 Wash. 321, 26 Pac. 219.

⁶ Morris v. Wilmts, 29 Neb. 569, 45 N. W. 784. Sufficient. Dennis v. Walsh, 16 N. Y. Supp. 257.

⁷ Cattell v. Ferguson, 3 Wash. 641, 28 Pac. 750.

⁸ Williams v. Vanderbilt, 40 Ill. App. 298, affirmed, 145 Ill. 238, 30 N. E. 458, 34 N. E. 476; Carthage Marble & White Line Co. v. Bauman, 44 Mo. App. 386; Farmilo v. Stiles, 52 Hun (N. Y.) 450, 5 N. Y. Supp. 579. Must not appear as made up afterwards to suit circumstances. Rand v. Parker, 73 Iowa, 396, 35 N. W. 493. Estoppel to deny consent, see §§ 37, 40.

consent.⁹ And it may be shown that what purports to be a written contract, is only a skeleton memorandum of the contract which was verbally made.¹⁰ The dates of the items of the account are admissible to show that plaintiff is entitled to a lien. And the date of its assignment is admissible as bearing on the question of authority of the defendant's agent to bind him by the purchase of the account.¹¹ If the plaintiff wilfully claims on an erroneous statement, evidence of this fact is admissible and if established he will fail in his action.¹² But this does not mean that he will lose his lien by reason of making an excessive claim. If the particular part is not pointed out and objected to on the trial the verdict will not be set aside on appeal.¹³ If the building contract stipulates that the architect's certificate shall be conclusive evidence of the right to a lien, this is admissible and no further evidence is required to render a judgment.¹⁴ Where the notice in evidence states the amount due, and the contract price, this will be sufficient, if not denied, to show the value of the materials furnished.¹⁵ It is not necessary that the sale of materials should be charged in a book; any satisfactory evidence that they were actually furnished is admissible.¹⁶ But this fact cannot be inferred, it must be proven.¹⁷ Under the Ohio statutes, the mere fact that the head contractor does not dispute the claim of the subcontractor does not make claim of the subcontractor *prima facie* correct.¹⁸ The contract

⁹ *Smith v. Gill*, 37 Minn. 455, 35 N. W. 178.

¹⁰ *Land Mortgage Bank v. Quannah Hotel Co.*, 89 Tex. 332, 32 S. W. 573.

¹¹ *Mahoney v. Butte Hardware Co.*, 19 Mont. 377, 48 Pac. 545.

¹² *Walls v. Ducharme*, 162 Mass. 432, 38 N. E. 1114.

¹³ *Hall v. St. Louis Mfg. Co.*, 22 Mo. App. 33.

¹⁴ *Snaith v. Smith*, 5 Misc. (N. Y.) 593, 25 N. Y. Supp. 513.

¹⁵ *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709.

¹⁶ *Wolf v. Batchelder*, 56 Pa. St. 87.

¹⁷ *Henry & Coatsworth Co. v. McCurdy*, 36 Neb. 863, 55 N. W. 261; *Cassidy v. Fonham*, 14 N. Y. Supp. 151.

¹⁸ *Bender v. Stettinius*, 10 Ohio Dec. 186, 19 W. L. Bull. 163.

between the owner and the contractor is admissible to show the value of the materials.¹⁹ Where the statute requires a notice to be given, this notice is admissible, but the evidence must show that the notice given corresponds with the case as made out in the pleadings.²⁰ The statement filed is only evidence of its filing and the sufficiency of its contents for filing.²¹

§ 263. **Miscellaneous matters before trial.**—In a previous section,¹ attention was called to the fact that the proceeding to enforce a mechanic's lien is usually governed by equitable principles and that unless some of the grounds for which an injunction would ordinarily be granted in such courts are shown to exist it will not be allowed in an action on a mechanic's lien. Where, however, some particular injury may occur the injunction will usually be granted.² In the absence of statute, it is held that the plaintiff is not entitled to have a receiver for the property *pendente lite*.³ But many of the states provide for the appointment of a receiver, and it is believed that where a proper case is presented to a court of equity a receiver will usually be appointed, though the statute does not expressly so authorize.⁴ Money in the hands of a receiver is simply money in the hands of the court and subject to its orders.⁵ If the court has jurisdiction of the

¹⁹ *Cattanach v. Ingersoll*, 5 Clarke 144, 1 Phila. (Pa.) 285.

²⁰ *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767.

²¹ *Iowa*.—*Lewis v. Saylor*, 73 Iowa, 504, 35 N. W. 601.

Nebraska.—*Hassett v. Curtis*, 20 Neb. 162, 29 N. W. 295.

New York.—*Hunter v. Walker*, 128 N. Y. 668, 29 N. E. 145, 1030.

Pennsylvania.—*Norris' Appeal* 30 Pa. St. 122.

Washington.—*Fairhaven Land Co. v. Jorden*, 5 Wash. 729, 32 Pac. 729.

¹ See § 201.

² *Chamberlin v. McCarthy*, 59 Hun (N. Y.) 158, 13 N. Y. Supp. 217; *Webb v. Van Zandt*, 16 Abb. Pr. (N. Y.) 214. See § 201.

³ *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688; *Meyer v. Seebald*, 11 Abb. Pr. (N. Y.) 326. See Dec. & Am. Dig. tit. *Mechanics' Liens*, § 283.

⁴ *Webb v. Van Zandt*, 16 Abb. Pr. (N. Y.) 314.

⁵ *Andrews & Hitchcock Iron Co. v. Smead Heating & Ventilating*

subject matter and some one of the defendants, the action should not be dismissed without a hearing.⁶

§ 264. **Miscellaneous matters before trial—Reference.**—Whether matters to be presented in the trial should be referred to a master for report or decision depends on the procedure of the particular state. The action on a mechanic's lien is generally regarded as of such character that it may be referred in common with other cases.⁷ One ground for reference is that the issue will involve the examination of a long account.⁸ A reference is generally granted where the question involved is a mixed question of law and fact.⁹ Under a Massachusetts statute, the auditor has authority to determine whether the petition or certificate is seasonably filed and matters of like character.¹⁰ And where a matter is referred to the master to ascertain claims and report on liens and their priorities, it is clearly contemplated that the master

Co., 7 Ohio N. P. 439, 5 Ohio S. & C. P. Dec. 292.

⁶ *Lowber v. Childs*, 2 E. D. Smith (N. Y.) 577, 1 Abb. Pr. (N. Y.) 415; *Bartlett v. Clough*, 94 Wis. 196, 68 N. W. 875. Personal judgment. *Snaith v. Smith*, 7 Misc. (N. Y.) 37, 27 N. Y. Supp. 379. After having pleaded. In re Lien on Broadway, 15 Abb. Pr. (N. Y.) 335. While pending on reference. *McGuckin v. Coulter*, 33 N. Y. Super. Ct. 324, 10 Abb. Prac. (N. Y.) 128.

⁷ *Rall v. McCrary*, 45 Mo. App. 365; *Schacttler v. Gardiner*, 41 How. Pr. (N. Y.) 243. Notice to take testimony before. *Fergus v. Chicago Sash & Door Co.*, 64 Ill. App. 364.

⁸ *Tooker v. Rinaldo*, 2 Abb. N. Cas. (N. Y.) 334.

⁹ *Scott v. Roberts*, 21 Pa. Co. Ct. 491, 7 Pa. Dist. 606; *Menner v. Nichols* (Pa.), 8 Atl. 647; *Beegle v. McGarry*, 1 Lack. Leg. N. (Pa.) 131; *New York Metal Ceiling Co. v. Kiernan*, 73 N. J. L. 763, 65 Atl. 444. Under the mechanic's lien law, the question whether when an old building is renewed by considerable repairs it is "an erection or construction," is a mixed question of law and fact, and is properly referred to a commissioner competent to pass upon both law and fact. *Yohe's Appeal*, 55 Pa. St. 121.

¹⁰ *Corbett v. Greenlaw*, 117 Mass. 167.

should hear proof of claims, and a failure to do so will be error.¹¹

§ 265. **Trial.**—Questions arising in reference to the procedure in the trial of the case are always regulated by the law of the forum wherein the trial is had,¹ and in a general way it may be said that unless the statute makes some special exception thereto, the mode of trial upon the issues raised in the enforcement of a mechanic's lien are the same as those relating to like questions arising in trials generally. If the action is treated as a common law action, or the statute specifically so provides, the questions of fact are tried by a jury. Where the proceeding is in the nature of an equitable suit or a chancery action all questions, both law and fact, are submitted to the judge unless the judge should make up an issue and refer it to a jury or should refer same matter to a master.² The question at the outset is to determine whether, under the law of the forum in which the action is pending, the proceeding is as a common law or an equitable action.³

¹¹ *Carl v. Crosse*, 23 Ky. L. Rep. 1586, 65 S. W. 604. A trial on the main issue should be had before the court before a reference for examination of a long account. *O'Brien v. New York Butchers' Dressed Meat Co.*, 54 Misc. (N. Y.) 297, 105 N. Y. Supp. 950.

¹ *Kelsey v. Rourke*, 50 How. Pr. (N. Y.) 315.

² See § 264. See Dec. & Am. Dig. tit. Mechanics' Liens, § 286.

³ "In courts of law, the agency of juries is indispensable. Their province is to determine the facts of the case; that of the court, to settle the law arising on such facts. Hence the right of trial by jury in such courts is secured by constitutional guaranty, and a

verdict being found there as to material facts submitted for the settlement of a jury, the court in the rendition of its judgment, may not disregard such finding. If, in the estimation of the court, it is wrong either as to law or evidence, the court can avoid it only by setting it aside, and granting a new trial, or by arresting the judgment. The refusal to do so, is, in this state, assignable for error by statutory enactment. But in the machinery of courts of equity, no such agency is necessary. This results from the constitution of such courts, and the peculiar character of its jurisdiction. Every question made before it is supposed to be addressed to

Where there is an issue of fact involved,⁴ the court cannot issue a decree without hearing testimony even though the defendant should not contest the case.⁵ Where the allegations of the answer merely affect the validity of the lien and there is no affirmative relief to be had, it has been held that the case may be dismissed upon the plaintiff's application.⁶ And so, where the answer does not set up a sufficient defense, a decree may be rendered upon the pleadings of plaintiff.⁷ But if there is an answer its efficiency must first be tested by proper procedure.⁸ If the answers should be ineffective, upon such procedure, an amendment of course will be allowed

the conscience of the chancellor, and the law and facts involved in any such question must necessarily be determined by him; therefore, when in complicated cases of account or fraud, the aid of a jury is invoked by the Chancellor, it is only to advise his conscience, and the verdict being rendered, is not conclusive upon him, nor necessarily to govern in the rendition of his decree. Its office is not to settle the facts, but to aid him in their ascertainment that he may settle them. Then, although the chancellor undoubtedly may set aside a verdict, and order another trial by a jury, yet this should be of his own mere motion the better to satisfy him as to the matters of fact in issue, and not as a matter of right, on the motion of either party. But the chancellor rejecting the verdict, so far as inconsistent with the issues or incompatible with the testimony, may go on to dispose of the case, as equity and justice may demand, without either

granting a new trial or arresting the judgment, as in a court of law in such cases might be necessary. Consequently, his refusal to do so is not assignable for error. *Garrett v. Stevenson*, 8 Ill. 261, 269. Nature of remedy. See §§ 196, 197.

⁴ Questions of law and fact. See § 267.

⁵ The defendant's attorney having refused to represent him any longer on account of his fees not being paid, and the defendant himself not being present, the plaintiff was not entitled to judgment without going on and making out a prima facie case. *McConnell v. Bryant*, 38 Ga. 639. As to what is proper testimony, see §§ 256-262.

⁶ *Althen v. Tarbox*, 48 Minn. 1, 50 N. W. 828.

⁷ *Hill v. Meyer*, 47 Mo. 585; *Kenney v. Monahan*, 169 N. Y. 591, 62 N. E. 1096.

⁸ *Wilkinson v. Brice*, 148 Pa. 153, 23 Atl. 982, 30 W. N. Cas. 30.

where the ends of justice will be subserved thereby.⁹ An action should not be dismissed if it is shown that there is any amount due the plaintiff.¹⁰ The matter as to foreclosure of a lien may be dismissed and personal judgment rendered if the pleadings and facts so authorize. If the court has properly acquired jurisdiction, then the rights of all parties will be protected as far as possible.¹¹ Unless the statute so requires a special notice of trial is not necessary. When a person is properly served with process,¹² he is in court and is bound to take notice of the orders made by the court as to time of trial. And where the statute determines the place of the trial, this being a matter of law, he is bound to take notice of the same.¹³ If the case, however, is once heard, it will be reversible error to re-open it without notice to all interested parties, and the same will be true, if without fault of the party, the case had been heard in his absence.¹⁴ The matter of the time of trial is one that rests largely in the discretion of the trial judge, but it will be error to force a person into trial before time for pleading has expired or the time set for trial by the code.¹⁵ Though the usual procedure is for plaintiff to introduce his evidence showing his cause of action which is to be followed in proper order by evidence, in rebuttal, yet the time and order of introduction of evidence largely rest in the

⁹ *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095.

¹⁰ *Brewer v. Hugg*, 114 Iowa 486, 87 N. W. 409.

¹¹ May consolidate cases, and work out the rights of all. *Dahlborg v. Wyzanski*, 175 Mass. 34, 58 N. E. 593. Where the several liens of the subcontractor and his material man are disputed by the landowner in proceedings to enforce them, the court will not stay the proceedings of either; but after the rights to such liens have been established the court

has power to make such orders, and to control its processes so as to protect the landowner from double payment or other injustice. *Flanagan v. O'Connell*, 88 Mo. App. 1.

¹² See §§ 232-233.

¹³ *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267; *Mahoney v. McWalters*, 91 Hun (N. Y.) 247, 36 N. Y. Supp. 149.

¹⁴ *Sprague Inv. Co. v. Mouat Lumber & Investment Co.*, 14 Colo. App. 107, 60 Pac. 179.

¹⁵ *Rice v. Simpson*, 26 Kan. 143.

discretion of the trial judge.¹⁶ Evidence which does not tend to prove or disprove the matters at issue should not be received.¹⁷

§ 266. **Trial—Jury.**—It is a general rule that in order to save the question for error, the objection should be made at the time the evidence is offered. As heretofore stated, if the action is treated as one of equitable jurisdiction, the judge decides issues both of law and fact, but he may refer any fact to a jury for its decision,¹⁸ and if the action is treated as one at law, then parties are entitled to a common law jury trial. In some jurisdictions, however, while the action is regarded as an equitable one, yet the parties are entitled to have a jury pass upon the issues of fact.¹⁹ As in other jury trials, the court may allow a view of the premises by the jury in charge of the proper officer. Matters seen by the jury are not evidence in the strict sense of the term. The purpose of the view is merely to enable the jury to better understand and apply the evidence introduced in the court; the judge is not required to be present at such a view.²⁰

¹⁶ *Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674.

¹⁷ *Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285.

¹⁸ *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. 463; *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341.

¹⁹ *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352. Finding raising presumption as to date. *Monaghan v. Goddard*, 173 Mass. 468, 53 N. E. 895. Inconsistent findings. *Richards v. O'Brien*, 173 Mass. 332, 53 N. E. 858. Under Rev. St. Wis., § 3323, providing that in actions to enforce me-

chanics' liens any issue of fact shall, on demand of either party, be tried by a jury, whose verdict shall be conclusive as in other cases, where a jury is demanded in such action, but neither party designates what issue he desires to have tried by the jury, the court has the right, of its own motion, to submit such questions to the jury as it deems advisable, the verdict thereon being advisory merely, and the remaining issues are to be determined by the court. *Bartlett v. Clough*, 94 Wis. 196, 68 N. W. 875.

²⁰ *Moritz v. Larson*, 70 Wis. 569, 36 N. W. 331.

§ 267. **Questions of law and fact.**—In jurisdictions where the foreclosure of the lien is for a court of equity, then questions of law and fact are both submitted to the judge and it is not particularly necessary to discriminate between them; but if, either by reason of being an action at law or by statutory provisions, questions of fact are to be passed upon by a jury, it then becomes quite important to know whether the question presented is one of law or one of fact. Sometimes this distinction is quite evident, but at other times the dividing line is not easily discerned.¹ Whether or not the complainant has performed the things that bring him within the statutory provisions creating a lien, is a question of fact,² but whether the statement or petition sufficiently avers the required facts is a question of law.³ Whether the materials are so furnished as to constitute one contract or separate contracts,⁴ or whether they were furnished upon the credit of the contractor or the building,⁵ or whether the structure is an old one or a new one, where the statute makes such fact a distinguishing feature,⁶ or whether the material was furnished within a certain time, and the last item in the account was furnished or done in good faith,⁷ or whether the property is described sufficiently

¹ *Bell v. Mecum* (N. J. L.), 68 Atl. 149. See Dec. & Am. Dig. tit. Mechanics' Liens, § 288.

² *Williams v. Porter*, 51 Mo. 441; *Moore v. Carter*, 146 Pa. 492, 23 Atl. 243, 29 W. N. Cas. 274; *Kelly v. McGehee*, 137 Pa. 443, 20 Atl. 623, 26 W. N. Cas. 493.

³ *William v. Porter*, 51 Mo. 441.

⁴ *Clanagan v. O'Connell*, 88 Mo. App. 1; *Western Iron Works v. Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac. 413; *Helena Steam Heating & Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78.

⁵ *Odd Fellows' Hall v. Masser*,

24 Pa. St., 507, 64 Am. Dec. 675; *Rider-Ericsson Engine Co. v. Fredericks*, 25 Pa. Super. Ct. 72; *Scott Mfg. Co. v. Morgan*, 217 Pa. 367, 66 Atl. 566. (Owner a contractor.)

⁶ *Mehl v. Fisher*, 13 Pa. Super. Ct. 330; *Goeringer v. Schappert*, 10 Kulp. (Pa.) 95, 14 York Leg. Rec. (Pa.) 92; *McDowell v. Riley*, 8 Del. Co. (Pa.) 181, 16 Pa. Super. Ct. 515.

⁷ *Bankers' Building & Loan Assn. v. Williams* (Neb.) 96 N. W. 6551.

to identify it,^{7a} or what material can be used in the erection of a building,⁸ or attached to a building so as to become a part of it,^{8a} or that the lien claim has been paid,⁹ or how much, or what land is covered by the lien claim,¹⁰ or whether an assignee, who was also surety on the contractor's bond, is finishing the building as "assignee" or on his own individual credit,¹¹ or whether a parol contract has been made since the written one upon which action is brought,¹² are all questions of fact for the jury, where jury trial is had. The court may, if there is not sufficient evidence to sustain a lien, dismiss the action.¹³ However, where the scintilla rule prevails, if there is any evidence at all which will sustain the lien, the action cannot be dismissed without submitting the same to the jury. Whether the original contract has been waived and a new one substituted,¹⁴ or in what kind of pay, cash or property, the contractor was to be paid,¹⁵ or whether the contract was performed according to its terms,¹⁶ are questions of fact. When the time that the work was commenced is material, it is also a question of fact for the jury.¹⁷ So if the lien right depends upon whether the building was completed, this is a

^{7a} *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077.

⁸ *Coverdill v. Heath*, 12 Pa. Super. Ct. 15.

^{8a} *Stevenson v. Woodward*, 3 Cal. App. 602, 86 Pac. 990.

⁹ *Corbett v. Greenlaw*, 117 Mass. 167.

¹⁰ *James v. Van Horn*, 39 N. J. L. 353.

¹¹ *McChesney v. Syracuse*, 75 Hun (N. Y.) 503, 27 N. Y. Supp. 508.

¹² *Buckley v. Hann*, 68 N. J. L. 624, 54 Atl. 825. Where a sci. fa. on a mechanic's lien has been regularly served, the question whether the claim has been paid

is for the jury. *Stoke v. McCullough*, 107 Pa. St. 39.

¹³ *Hengstenberg v. Hoyt*, 109 Mo. App. 622, 83 S. W. 539.

¹⁴ *Wahlstrom v. Trulson*, 165 Mass. 429, 43 N. E. 183; *Moore v. Carter*, 146 Pa. 492, 23 Atl. 243, 29 W. N. Cas. 274.

¹⁵ *Pierce v. Marple*, 148 Pa. 69, 23 Atl. 1008, 30 W. N. Cas. 31, 33 Am. St. 808.

¹⁶ *Goodfellow v. Manning*, 148 Pa. 96, 23 Atl. 1052. Original or independent contract. *Fish Co. v. Young*, 127 Wis. 149, 106 N. W. 795.

¹⁷ *Kelly v. Rosenstock*, 45 Md. 389.

question of fact for the jury.^{17a} Likewise, if it is material whether the building or work constitutes a kind of building or work that comes within the lien law.¹⁸ If the facts are admitted, then whether or not the building was the kind that comes within the law is one of law for the court to decide.¹⁹ Whether the description in the statement and the petition are the same,²⁰ or the description is sufficient to identify the property are generally considered to be questions of fact for a jury.²¹ The question of time is likewise a question of fact where the dispute is whether the lien was filed within the required time.²²

§ 268. **Instructions to jury.**—In all jury trials it is the duty of the judge before the jury retires for its deliberations to "charge the jury," that is, instruct and explain to the jury the

^{17a} *Cole v. Barron*, 8 Mo. App. 509.

¹⁸ *Presbyterian Church v. Allison*, 10 Pa. St. 413; *Furman v. Masson*, 6 Phila. (Pa.) 222. In an action for a lien for repairs done on a brick machine, the question whether the title to the machine had passed, before the alterations, to the owner of the premises, and had become a fixture for manufacturing purposes, within the mechanic's lien law, was a question for the jury. *American Brick & Tile Co. v. Drinkhouse*, 59 N. J. L. 462, 36 Atl. 1034.

Constitutes part of building.—Whether or not a lightning rod erected on a building is the subject of a mechanic's lien is a question of fact, requiring a determination of a jury, in the absence of evidence or admissions as to the circumstances. *Bar-*

ber v. Roth, 19 Pa. Co. Ct. 366.

¹⁹ *Pennsylvania*. — *Warren v. Freeman*, 187 Pa. St. 455, 41 Atl. 290; *Armstrong v. Ware*, 1 Phila. (Pa.) 213, 8 Leg. Int. (Pa.) 124; *Smith v. Nelson*, 2 Phila. (Pa.) 113; *Norris' Appeal*, 30 Pa. St. 122; *Munger v. Silsbee*, 64 Pa. St. 454.

²⁰ *Kennedy v. House*, 41 Pa. St. 39, 80 Am. Dec. 594; *Ewing v. Barras*, 4 Watts & S. (Pa.) 467; *Hoffmaster v. Knupp*, 15 Pa. Co. Ct. 140.

²¹ *Dodge v. Hall*, 168 Mass. 435, 47 N. E. 110; *Brown v. West*, 7 Pa. Co. Ct. 619.

²² *Holden v. Winslow*, 18 Pa. St. 160; *Galland v. Schroeder* (Pa.), 12 Atl. 866. Whether an item of work done within four months from the filing of a claim for a lien is so connected with the earlier items that together they constitute one debt, is for

law applicable to the case under consideration.¹ In the foreclosure of mechanics' liens, the rule is the same as in other cases where a matter is submitted to the jury; that is, questions of law are for the decision of the court and those of fact for the jury.² Among other things, the jury should be charged and the law pointed out, that all requirements of the statute made conditions precedent to the right to a lien must have been complied with in order for the plaintiff to recover.³ This includes performance of the contract.⁴ However, if the formal matters are admitted, it will not be error to neglect to charge upon those matters.⁵ The instructions should not be based upon an hypothesis, concerning which there is no evidence.⁶ Neither should a matter be submitted to a jury which is not made an issue by the pleadings or evidence.⁷

the jury, where such an inference is permissible under the testimony. *Downington Mfg. Co. v. Franklin Paper Mills*, 63 N. J. L. 32, 42 Atl. 765.

¹ See Dec. & Am. Dig. tit. Mechanics' Liens, § 590.

² Questions of law and fact. See § 267.

³ *Cote v. Schoen*, 38 W. N. Cas. (Pa.) 382; *Hall v. Johnson*, 57 Mo. 521.

⁴ *Lombard v. Johnson*, 76 Ill. 599.

⁵ *Kelly v. Rowane*, 33 Mo. App. 440.

⁶ *Goldstein v. Leake*, 138 Ala. 573, 36 So. 458. In an action by a subcontractor to enforce a mechanic's lien, in which the original contractor was made a party defendant, and claimed certain set-offs against the plaintiff for money paid on plaintiff's account, a charge that defendant was en-

titled to credit for the amounts claimed, if, by the usual course of dealing between plaintiff and defendant, defendant had the right to believe that he was authorized to pay the amounts for plaintiff, is erroneous, where there was no evidence as to the previous course of dealing between the parties. *Trippensee v. Braun* (Mo. App.), 78 S. W. 674.

⁷ *Stillings v. Haggerty*, 59 Hun. (N. Y.) 622, 12 N. Y. Supp. 813; *Girard Point Storage Co. v. Riehle* (Pa.), 12 Atl. 172; *Burrell v. Way*, 176 Mass. 164, 57 N. E. 335. Hindered by defendant from finishing contract. *Helman v. Schroeder*, 74 Ill. 158. Completion of house. *Okisko Co. v. Matthews*, 3 Md. 168. Indebtedness—acceptance of work—new agreement. *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171, 65

§ 269. **Verdict and findings.**—Where, under the law, the issues of fact and law are both submitted to the judge for decision, the decision rendered by him is usually called a finding, and where the law requires the case to be submitted to the jury, the court can not establish the lien without a verdict of the jury upon the issues which the law requires to be submitted to the jury.¹ There must be at least an affirmative finding in all material matters.² The laws of the different states usually determine the form of verdict which

S. W. 318. Collateral security. *Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110. Extras—change of plans. *Lecoutout Bros. Stair Mfg. Co. v. Maddox*, 100 Mo. App. 57, 84 S. W. 99. Damage for failure to complete—breach of contract. *Kelly v. Rowane*, 33 Mo. App. 440. Finding for plaintiff if evidence shows debt. *Wood v. Atlanta, &c., R. Co.*, 131 N. C. 48, 42 S. E. 462. Changes in original contract. *Moore v. Carter*, 146 Pa. 492, 23 Atl. 243, 29 W. N. Cas. (Pa.) 274. Credit of building, etc. *Coverdill v. Heath*, 12 Pa. Super. Ct. 15. Finding what was contract. *Williamson v. Smith* (Tex. Civ. App.), 79 S. W. 51.

¹ *Florence Bldg. & Inv. Assn. v. Schall*, 107 Ala. 531, 18 So. 108; *Brooks v. Blackwell*, 76 Mo. 309; *Sprague v. Brown*, 178 Mass. 220, 59 N. E. 631. Sess. Laws Idaho, 1899, p. 147, an act to secure mechanics' and laborers' liens, by section 4 requires the trial court to ascertain the amount of land necessary for the convenient use of the property to be sold, and it is error not to do so. *Robertson v. Moore*, 10 Idaho 115, 77 Pac. 218. When an auditor in a

mechanic's lien case found that "petitioner made a just and true statement of the amount due him for materials furnished" with certain exceptions, such finding does not show, prima facie, that petitioner's statement was not just and true. *Buck v. Hall*, 170 Mass. 419, 49 N. E. 658. Conditional sale—need not find that claimant elected to treat sale as absolute. *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003. See Dec. & Am. Dig. tit. Mechanics' Liens, § 290.

² *Johnson v. Simmons*, 123 Ala. 564, 26 So. 650. Where special findings showed that the material was sold to the contractor and charged to him and was used in the construction of a building, but did not state that plaintiff furnished the material for the particular building on which he sought to enforce a lien, it can not be maintained. *Miller v. Fosdick*, 26 Ind. App. 152, 59 N. E. 488. See as to sufficient specific finding to support. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 Pac. 789.

should be followed in the trial of mechanic's lien cases.³ Where all parties agree a verdict will be sustained, even though the strict legal form has not been pursued.⁴ It is neither necessary nor proper that the verdict or finding shall narrate the evidence upon which the result is based.⁵ Where a finding is made in a court of equity upon a reference to a jury, although it may be irregular, the appellate court may correct the same and award judgment⁶ in accordance with justice and the facts.⁷ A general finding for the plaintiff establishes the right to a lien with attaching costs,⁸ even though there is no specific order to foreclose.⁹ The finding of facts made by a trial court must all be considered together to de-

³ Where the complaint contains the common counts and a special count, describing the structure and improvements sought to be charged with sufficient certainty, and issue is joined on the pleas of payment and set-off and the general issue, a verdict finding "the issues in favor of plaintiff, \$100," though informal, is sufficient to support a judgment establishing a lien for that sum on the structure and improvements. *Bedsole v. Peters*, 79 Ala. 133. The verdict must set forth the lien and the premises on which it is claimed. *Snow v. Council*, 65 Ga. 123.

⁴ *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

⁵ *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164.

⁶ *Garrett v. Stevenson*, 8 Ill. 261.

⁷ *Miller v. Ticknor*, 7 Ill. App. 393. Where the jury finds that there is due from the owner of a building to the contractor a cer-

tain sum, and from said contractor to a subcontractor, who was a party to the suit, another sum, the court may put the verdict in form by finding, in the decree, that there is due from the owner to the contractor the aggregate of both sums, out of which aggregate there is due from the contractor to the subcontractor the sum so found by the verdict to be due to him. *Schnell v. Clements*, 73 Ill. 613.

⁸ *Guthrie v. Brown*, 42 Neb. 652, 60 N. W. 939.

⁹ The verdict, so far as it related to the plaintiff's right to a lien, was simply "that he is entitled to a lien therefor." It was not error to enter judgment making the lien conform to that claimed in the complaint. *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39. It was not necessary that the verdict should direct such foreclosure. If the lien was subsisting at the time, the law authorized its foreclosure, regardless of what the jury

termine its sufficiency.¹⁰ However it must be evident from the verdict or finding that the material facts constituting a lien have been found to have been done to the proper establishment of the lien.¹¹ Thus the value of materials furnished will be sustained when the court finds that the persons were employed by the contractor at a certain price,¹² and that orders from time to time for the construction, erection and repair of a manufacturing plant are sufficient to show that they were furnished on the part of the material man to be used for that purpose.¹³ A verdict or finding that does not show the required conditions establishing such a contract between the plaintiff and owner is insufficient.¹⁴

§ 270. **Verdict and finding (continued).**—Necessarily, in order for a verdict or finding to be sustained, it must respond to the issues made in the case.¹ However, if no one was misled,²

might desire or direct. *Warner v. Scottish Mortgage, &c., Co.* (Tex. Civ. App.), 27 S. W. 817.

¹⁰ *El Reno Electric Light & Telephone Co. v. Jennison*, 5 Okla. 759, 50 Pac. 144. Where the judge finds as a matter of fact that, at the time the lien was filed, there was due from the owner of the building to the contractor a larger sum than was demanded by the plaintiff, and as a conclusion of law he finds that a specified sum is due to the plaintiff, for which he has a lien on the premises, the conclusion of law is correct. *Smith v. Coe*, 29 N. Y. 666.

¹¹ *Petersen v. Shain* (Cal.), 33 Pac. 1086.

¹² *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

¹³ *Goodrich v. Gillies*, 62 Hun (N. Y.) 479, 17 N. Y. Supp. 88.

Finding will not justify failure to file in proper county. *Meehan v. Zeh*, 77 Minn. 63, 79 N. W. 655.

¹⁴ *Minnich v. Darling*, 8 Ind. App. 539, 36 N. E. 173.

Balance due.—A finding that the value of the labor and material was, as agreed, a named amount; that a named amount had been paid, leaving a stated balance due unpaid; and that such balance was "for work done and materials furnished for defendant's house"—sufficiently shows that the materials and work were of the value agreed. *Brigham v. Dewald*, 7 Ind. App. 115, 34 N. E. 498.

¹ *California*.—*Gibson v. Wheeler*, 110 Cal. 243, 42 Pac. 810; *Green v. Chandler*, 54 Cal. 626.

Minnesota.—*Scheible v. Schickler*, 63 Minn. 471, 65 N. W. 920;

or the verdict is construed as applying to the issues made, it will not be set aside.³ It has been before stated that the issues must be found in favor of the validity of the lien or it can not be sustained.⁴ A finding of one fact will not necessarily raise a presumption of a like decision on another fact,⁵ but a reasonable interpretation should be given to the extent and scope of the finding or verdict.⁶ However, if the matter found in the verdict or finding is so contradictory that it is impossible to ascertain the meaning intended by the jury, the ver-

Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127.

Nebraska.—*Storer v. Boggs*, 3 Neb. (Unoff.) 301, 91 N. W. 555.

New York.—*Hauptman v. Catlin*, 1 E. D. Smith (N. Y.) 729.

In an action by a subcontractor against the owner and contractor, a verdict stating that the "plaintiffs are entitled to a lien," and we "assess their damages at \$565.81," is sufficiently responsive to the issues, as under the pleadings, only one of the defendants could be responsible. *Cole v. Barron*, 8 Mo. App. 509.

² In mechanic's lien foreclosure, the notices described the property as lots 94 and 95, in the town of K. The findings showed that the materials were furnished for, and the work done on, lots 94 and 95 in A. D. Toner's addition to the town of K. In the absence of a showing that a party was misled, there was no variance. *Northwestern Loan & Inv. Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

³ *Orlandi v. Gray*, 125 Cal. 372, 58 Pac. 15. Where it was con-

ceded that the contract had not been fully performed, a finding by the jury on the first issue, "did the petitioners perform the labor and furnish the materials set forth in the petition under the contract?" If "No" was, in connection with other findings, merely to the effect that the contract had not been completely performed. *Moore v. Dugan*, 179 Mass. 153, 60 N. E. 488.

⁴ *Young v. Berger*, 132 Ind. 530, 32 N. E. 318.

⁵ *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331.

⁶ *Higley v. Ringle*, 57 Kan. 222, 45 Pac. 619. In a trial the court found that the equitable owner of the lot and mill wherein they were used purchased them to be used on such property, but that there was no evidence that the plaintiff knew on what particular lot or property they were to be used. Equivalent to a finding that the understanding was that they were to be used in the purchaser's mill, and entitled plaintiff to his lien. *Atkins v. Little*, 17 Minn. 342.

dict can not stand,⁷ but if it is possible to reconcile the statements, then the verdict will not be disturbed.⁸ Where the law requires a thing to be done at a certain time, a finding that it was done on or about a certain date is too indefinite.⁹ However, if there is sufficient time remaining in which an act may be valid, such a finding will not be too indefinite.¹⁰ But the verdict must be definite in the amount awarded the plaintiff.¹¹ If the action is one in chancery, then the verdict is not conclusive, it merely being held as advice to the court upon the issues presented,¹² but if it is one at law or where by statute the issues of fact must be passed upon by a jury, the verdict is conclusive upon facts submitted to the jury and has the same force and effect as in all actions at law.¹³

§ 271. **Finding, decree or judgment.**—The finding, decree or judgment in an action is the conclusion of law upon the facts found and admitted by the parties, or upon their default in the course of the suit.¹ Generally a judgment or decree does not become a lien until the time it is entered.² A judgment or de-

⁷ *Cawley v. Day*, 4 S. Dak. 221, 56 N. W. 749.

⁸ *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.

⁹ *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643.

¹⁰ In an action brought April 18, 1879, the finding by the jury that the building was completed "on or about April 5, 1870," was not too indefinite, where 60 days are allowed after completion in which to file liens. *Sturges v. Green*, 27 Kan. 235.

¹¹ *Tisdale v. Alabama, &c., Lumber Co.*, 131 Ala. 456, 31 So. 729.

¹² *Sharkey v. Miller*, 69 Ill. 560.

¹³ *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139.

¹ See Dec. & Am. Dig. tit. Mechanics' Liens, § 291.

² *Redman v. Williamson*, 2 Iowa 488; *Jennings v. Newman*, 52 How. Pr. (N. Y.) 282; *Howes v. Dolan*, 9 Pa. Super. Ct. 586, 44 W. N. C. (Pa.) 62.

Lien of material men; character of, and how perfected.—The lien given by the statute to material men, is neither a *jus in re*, nor a *jus ad rem*, but simply a right to charge the property affected by it with the payment of the particular debt, in preference and priority to other debts, on compliance with the requisitions of the statute; and it is inchoate

cree on a mechanic's lien does not create a lien; it is a mere finding that the lien is there and the holder is entitled to have it enforced, and in matter of its form and requisites in general must necessarily be controlled by the law of the forum where the action is brought.³ The judgment should be in rem,⁴ and should designate the land that is to be taken to satisfy the lien,^{4a} and should state the amount of the debt.⁵ If there is more than one property where the lien is against several, the judgment should specify the amount due from each.⁶ If more than one person is to be held liable it ought to specify what is due from each, as well as the property subject to the lien.⁷ Where a number of persons have been brought into the case,

until perfected by rendition of a judgment in rem, in the mode pointed out by the statute. *Porter v. Miles*, 67 Ala. 130.

³ *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.) 729.

⁴ *Plummer v. Eckenrode*, 50 Md. 225; *Sly v. Pattee*, 58 N. H. 102; *Norton v. Sinkhorn*, 61 N. J. Eq. 508, 48 Atl. 822, 63 N. J. Eq. 313, 50 Atl. 506.

Not a Personal Judgment.—Though in the form of a personal judgment, which contains no direction that execution shall issue, but declares that it shall be satisfied by a sale of the property on which the lien is claimed, and that on the return of the sheriff a judgment shall be docketed against defendant for any deficiency, is not objectionable as being a personal judgment. *Cole v. Custer County Agricultural, &c. Assn.*, 3 S. Dak. 272, 52 N. W. 1086. Ordering that "plaintiff do have and recover of defendant," a certain sum, with costs, is not a personal judgment for

the sum named, but merely an assessment of the sum due, as required by statute. *Crocker v. Currier*, 65 Wis. 662, 27 N. W. 825.

^{4a} *Stephens v. Duffy*, 41 Ind. App. 385, 83 N. E. 268.

⁵ *Plummer v. Eckenrode*, 50 Md. 225.

⁶ *Treusch v. Shryock*, 55 Md. 330, *Dahlborg v. Wyzanski*, 175 Mass. 34, 58 N. E. 593; *Bowman v. McLaughlin*, 45 Miss. 461. Rev. St. 1889, Missouri, § 6718, provides that a judgment enforcing a mechanic's lien shall be against the debtor, as in ordinary cases, "with the addition that, if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof shall be levied" on the property charged with the lien, and, unless such addition is embodied in the judgment, it is fatally defective. *Farley v. Cammann*, 43 Mo. App. 168.

⁷ *Stark v. Crismore*, 100 Ill. App. 392; *Reilly v. Hudson*, 62 Mo. 383; *Farley v. Cammann*, 43

only one decree or decision should be made covering substantially all the issues decided and declaring the priorities of the several liens.⁸ The judgment in this kind of a case is analogous to a judgment in foreclosure of a mortgage, and should be made with the same degree of certainty,⁹ and ordinarily the judgment need not state that the sum found due is for work, if there is a general finding of the truth of the allegations of the complaint.¹⁰ Under some statutes, however, it must be found that the material was purchased to be used and actually was used in the building upon the land sought to be made liable for the lien, and it will be well to state this fact in the decree.¹¹ The action being in rem, personal service is not necessary for a valid decree.¹² Where the entire amount of the indebtedness is not yet due, judgment should be rendered for what is due and as the other amounts become due, judgments may likewise be entered.¹³

§ 272. Judgment by default—Sufficiency—Description.—

The conditions upon which a decree by default can be lawfully rendered depend upon the statutes and rules of court in which the action is brought.¹ Where a prayer is merely for a decree as permitted by the mechanic's lien law, a default judgment can

Mo. App. 168. Against original contractor and owner. *Julien v. Ristow Poths Mfg. Co.*, 54 Ill. App. 460.

⁸ *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522.

⁹ *Althause v. Warren*, 2 E. D. Smith (N. Y.) 657.

¹⁰ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *Walker v. O'Donohoe*, 67 Mo. App. 660.

¹¹ *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008.

¹² *O'Rourke v. Butte Lodge No. 14*, 19 Mont. 541, 48 Pac. 1106.

A decree in favor of a subcontractor is not erroneous in not making the contractor a party, where it appears that the contractor was beyond the jurisdiction of the court. *Miller v. Calumet Lumber & Mfg. Co.*, 121 Ill. App. 56. See Process, §§ 232-234.

¹³ *El Reno Electric Light & Telephone Co. v. Jennison*, 5 Okla. 759, 50 Pac. 144.

¹ *Welde v. Henderson*, 53 Hun (N. Y.) 633, 6 N. Y. Supp. 176; *Johnson v. Scofield*, 22 Pa. Co. Ct. 382, 8 Pa. Dist. 410; *Ruhland v. Alexander*, 19 Pa. Co. Ct. 577, 41

not be entered; it might be otherwise where the prayer is for other and further relief.² The rule is very broad and varies considerably in various jurisdictions in the discretion of the court.³ The decree should be certain enough and contain sufficient to show that it is justified under the law,⁴ and that the lien was given within the time allowed.⁵ But no particular form is required.⁶ It should be sufficiently certain to enable the execution officer to identify the property which is to be sold to satisfy the lien.⁷

W. N. C. (Pa.) 16. The court should decree its enforcement for the amount tendered, even though it is adjudged that the lien is invalid. Decree, *Campbell v. William Cameron & Co.*, 5 Ind. Ter. 323, 82 S. W. 762, reversed, *Cameron v. Campbell*, 141 Fed. 32, 72 C. C. A. 520. See ante, Presumptions, § 256; Burden of Proof, § 257.

² *Arata v. Tellurium Gold, &c.* Min. Co., 65 Cal. 340, 4 Pac. 195.

³ *Clear Creek Gold & Silver Min. Co. v. Root*, 1 Colo. 374.

Instances.—A decree to enforce a mechanic's lien ordering a sale of the land on default by defendants in the payment of a certain sum, does not impose a personal liability on defendants. *Bumgartner v. Hall*, 163 Ill. 136, 45 N. E. 168. In moving to set aside the default, the garnishee must also show a sufficient excuse for the default. *Parmenter v. Childs*, 12 Iowa, 22. Where the owner makes default, and the evidence does not show that a trust deed prior to the lien has been foreclosed, and the owner's equity of redemption sold, plaintiff is en-

titled to a judgment subjecting the owner's right of redemption to the satisfaction of his debt. *Shultze v. Alamo Ice, &c. Brew. Co.*, 2 Tex. Civ. App. 236, 21 S. W. 160.

⁴ **California.**—*Wilson v. Nugent* 125 Cal. 280, 57 Pac. 1008; *Kennedy-Shaw Lumber Co. v. Priet*, 113 Cal. 291, 45 Pac. 336; *Nelhaus v. Morgan (Cal.)*, 45 Pac. 255.

Kansas.—*Kansas Loan & Trust Co. v. Phelps, &c.*, *Windmill Co.*, 7 Kan. App. 469, 54 Pac. 136.

Maine.—*Johnson v. Pike*, 35 Me. 291.

Missouri.—*Fink v. Remick*, 33 Mo. App. 624.

Wisconsin.—*Carney v. La Crosse, &c.*, R. Co., 15 Wis. 558, 82 Am. Dec. 698.

⁵ *Nibbe v. Brauhn*, 24 Ill. 268.

⁶ *Decker v. O'Brien*, 1 App. Div. (N. Y.) 81, 36 N. Y. Supp. 1079.

⁷ *Buckley v. Boutellier*, 61 Ill. 293; *Snow v. Council*, 65 Ga. 123; *Lecoutour v. Peters*, 57 Mo. App. 449; *Cole v. Custer County Agricultural, &c., Assn.*, 3 S. Dak. 272, 52 N. W. 1086.

A mere clerical error, however, will not destroy its priority.⁹ It must not describe more than is legally liable for the lien,¹⁰ or it will be invalid, especially as to the excess,¹¹ and in some cases will be held to include only so much of the land as is covered by the buildings.¹² The courts have held that it ought not to be set aside for failure to properly describe the land if there is some part that can be identified from the description, which is subject to the lien.¹³ And if the petition gives sufficient description, all the details need not be repeated in the decree.¹⁴

§273. Judgment—Conformity to previous proceedings.—The judgment must correspond with the material averments of the petition,¹ and be warranted by the issues in the case,² and evidence submitted.³ It cannot be in favor of a person

⁹ McCoy v. Quick, 30 Wis. 521.

¹⁰ Maxwell v. Koeritz, 35 Ill. App. 300.

¹¹ Dusalck v. Meiselbach, 118 Wis. 240, 95 N. W. 144.

¹² Tibbetts v. Moors, 23 Cal. 208.

¹³ Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932. A judgment described the property subjected to the lien as the one-half interest therein of the defendant. Inasmuch as it did not appear that any greater interest was charged than was owned by the defendant, the judgment was in accordance with the mandate of this court on a prior appeal of the cause. Vanriper v. Morton, 65 Mo. App. 429. Where there is a finding that three contiguous lots in a city block were used as one, a judgment giving a lien upon the entire tract will not be disturbed for the reason that the lien should have been confined

to the single lot upon which the house was built. Meinholz v. Grodt, 4 Mo. App. 568.

¹⁴ Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798. A person not served with process not bound. Alberti v. Moore, (Okla.) 93 Pac. 543.

¹ Porter v. Miles, 67 Ala. 130, Laughlin v. Reed, 89 Me. 226, 36 Atl. 131.

² Lothian v. Wood, 55 Cal. 159; Roberts v. Wilcoxson, 36 Ark. 355; Glos v. John O'Brien Lumber Co., 183 Ill. 211, 55 N. E. 712; Du Bay v. Uline, 6 Wis. 588, [560]. Also as to description. Adams v. Cook, 55 Tex. 161. In an action in assumpsit a judgment to enforce a mechanic's lien cannot be entered. Rupe v. New Mexico Lumber Assn., 3 N. Mex. 261, 5 Pac. 730.

³ Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350; Bearden v. Miller, 54 Mo. App. 199.

not entitled to it,⁴ or for items not set up in the pleadings.⁵ The items not properly included may on motion be stricken out and the decree allowed to stand.⁶ Generally where the action is an equitable one, the court will conform the decree to the issues and evidence, even though the form of the verdict be departed from,⁷ the parties being given the relief which they are in law entitled to.⁸ Of course unless the parties are shown to have some definite interest in the premises or liability, a judgment against them can be of no avail.⁹ If under the law two are liable, it is erroneous to enter it against one.¹⁰ Unless the law specially so provides, the court will not decree a specific performance of an agreement to convey property to satisfy the lien.¹¹

§ 274. **Order of sale—Priorities and distribution.**—It is a very common thing in the order of sale to make a finding as to priority and distribution of proceeds. The priority of the claims have been discussed in previous chapters and the rules there laid down govern as to the priorities of claims.¹ As a matter of course there cannot be a valid order of sale of the

⁴ *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758.

⁵ *Santa Monica Lumber & Mill Co. v. Hege* (Cal.), 48 Pac. 69; *Briggs v. Bruce*, 9 Colo. 282, 11 Pac. 204; *Lutz v. Ey*, 3 E. D. Smith (N. Y.) 621.

⁶ *Maurer v. Bliss*, 6 N. Y. St. 224; *Hill v. Milligan*, 38 Pa. St. 237.

⁷ *Sharkey v. Miller*, 69 Ill. 560.

⁸ *Chicago, &c., R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335.

⁹ *Keller v. Carterville Bldg. & Loan Assn.*, 71 Mo. App. 465.

¹⁰ *Culver v. Elwell*, 73 Ill. 536; *Building & Planing Mill Co. v. Huber*, 42 Mo. App. 432.

¹¹ "No power is given to decree

the performance of any other act; or process for the enforcement of any such decree. It is true that a lien may be filed, and the same enforced, where judgment is to be paid otherwise than in money. (Phillips on Mechanics' Lien, 129). But, in such cases, the court must determine the amount that is to be paid in money, and then proceed in the same manner as though such amount had been required to be so paid by the contract. In the present case, the defendant agreed to convey to the plaintiff a specific lot. But the plaintiff has made no demand of the deed, or shown any inability of the

property over which the court has no jurisdiction,² nor can it order a part of the premises sold when damage would result to the remainder.³ The court cannot, unless all interested parties consent, order a partition of the premises among claimants.⁴ But a part may be ordered first sold, if so requested by the defendant, if it is manifest that the part desired to be sold is sufficient to cover the claim. Neither can property be ordered sold on payments other than is required by law,⁵ nor can an order for sale be made of a greater interest than is subject to a lien.⁶ But there might be instances where if justice was subserved, the entire property might be sold, even if others had an interest therein.⁷ As a general rule, where there are different claims or different priorities,⁸ the court should find

defendant to make the conveyance. *Dowdney v. McCullom*, 59 N. Y. 367.

¹ See §§ 144-164.

² *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65.

³ *North Presbyterian Church v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261.

⁴ *Smith v. Corey*, 3 E. D. Smith (N. Y.) 642, 4 Abb. Pr. (N. Y.) 208. Sale, not partition, of the premises, is required. *Brown v. Jones*, 52 Minn. 484, 55 N. W. 54.

⁵ Where the amount of the debt is but a small proportion of the value of the whole property covered by the lien, it is proper to decree a sale for cash payment sufficient to pay the debt. *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

⁶ *Schmidt v. Gilson*, 14 Wis. 514. A judgment under the lien law, directing a sale of the premises on which the building is situated, is bad, as only the build-

er's interest can be sold by statute. *Dewey v. Fifield*, 2 Wis. 73.

⁷ In proceedings to enforce a mechanic's lien, the court generally may, if it sees proper, direct the sale of the estate of all parties having an interest in the premises; but it is not obliged to do so, and the better practice is not to do so, if the objects of the statute can be obtained by decreeing a sale of the interest of those parties only, against whose interest the lien equitably attaches. *Kidder v. Aholtz*, 36 Ill. 478.

⁸ Where a cross bill by a party to a suit to enforce a mechanic's lien asks the sale of the property to pay a mortgage held by him, the court will determine the priority of the liens upon the property, and decree their payment in the proper order. *Interstate Bldg. & Loan Assn. v. Ayres*, 71 Ill. App. 529.

the amount due each and the order of its priority.⁹ If the claims upon the building can be separated from the liens upon the land, where the law recognizes that the lien may be on the building separate from the land,¹⁰ the order should find the priorities of each, and the value of the property subject to each, and direct distribution according to their respective rights.¹¹ These matters must be done strictly as the law provides.¹² And if the order of sale does not determine the distribution of proceeds, this can be done at a future time.¹³ The order should provide for the sale of the property, and if it states that it was to be done as under execution it will not

⁹ *Croskey v. Corey*, 48 Ill. 442; *Ogle v. Murray*, 3 Ill. App. 343; *Hughes Bros. Mfg. Co. v. Conyers*, 97 Tenn. 274, 36 S. W. 1093; *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

¹⁰ *Leach v. Minick*, 106 Iowa 437, 76 N. W. 751.

¹¹ *Illinois*.—*Grundels v. Hartwell*, 90 Ill. 324; *Lunt v. Stephens*, 75 Ill. 507; *Tracy v. Rogers*, 69 Ill. 662; *North Presbyterian Church v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261.

Iowa.—*Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289, 70 N. W. 193; *Brodt v. Rohkar*, 48 Iowa 36.

Missouri.—*Bruce Lumber Co. v. Hoos*, 67 Mo. App. 264.

Under Miller's Code, 577, providing that, "if material was furnished in the erection of an original and independent building, commenced since the execution of such prior mortgage, the court may, in its discretion, order and direct such building to be separately sold under execution," the

burden is on the lienor to show that the separate sale of the building would be proper under all the circumstances; and a decree of the trial court in such a case, giving priority to the mortgage will not be set aside, where the building is a fixture, and all that is made to appear is that the land is not sufficient to pay the mortgage. *Miller v. Seal*, 71 Iowa 392, 32 N. W. 391. Code Civ. Proc., 3403, relative to the foreclosure of mechanics' liens, provides that the court may adjust and determine the equities of all parties and the order of different liens, and determine all issues raised by defense or counterclaim. *Schultze v. Goodstein*, 82 App. Div. (N. Y.) 316, 81 N. Y. Supp. 946.

¹² *Bayard v. McGraw*, 1 Ill. App. 134; *Kennedy v. McKone*, 10 App. Div. (N. Y.) 88, 41 N. Y. Supp. 782.

¹³ *Kelley v. Chapman*, 13 Ill. 530, 56 Am. Dec. 474.

be erroneous.¹⁴ But there must be some order for sale of the property,¹⁵ in compliance with the statute.¹⁶ It will not be erroneous to direct the order to the sheriff, when it should have been to a master,¹⁷ or to direct the sale of the fee, even though there be a mortgage on the property,¹⁸ or to give the purchaser immediate possession.¹⁹ If the statute provides the length of time which shall elapse between the order of sale and the time the sale is made, it must be followed.²⁰ If there is no such statutory provision it is within the discretion of the court,²¹ but, at least, in some courts, it is held that a reasonable time must be allowed.²²

§ 275. Order of sale—Interest on claim—Effect of order.—

The right to interest on the claim has been heretofore considered.¹ If the date of the payment is fixed by contract it properly dates from that time;² if not so fixed, from the commencement of the action,³ to the time of judgment, and then to the

¹⁴ *Meehan v. Williams*, 36 How. Pr. (N. Y.) 73, 2 Daly. (N. Y.) 367.

¹⁵ *Riggs v. Stewart*, 14 N. Y. Civ. Proc. 141, 14 N. Y. St. 695.

¹⁶ *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

¹⁷ *Kelley v. Chapman*, 13 Ill. 530, 56 Am. Dec. 474.

¹⁸ *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481.

¹⁹ *Luce v. Curtis*, 77 Iowa 347, 42 N. W. 313.

²⁰ *Freibroth v. Mann*, 70 Ill. 523; *Kinzey v. Thomas*, 28 Ill. 502; *Claycomb v. Cecil*, 27 Ill. 497.

²¹ *Clear Creek Gold & Silver Min. Co. v. Root*, 1 Colo. 374.

²² *Bush v. Connelly*, 33 Ill. 447; *Rowley v. James*, 31 Ill. 298; *Moore v. Bracken*, 27 Ill. 22;

Six months months not unreasonable. *Strawn v. Cogswell*, 28 Ill. 457. Not less than execution. *James v. Hambleton*, 42 Ill. 308. Not less than 90 days. *Link v. Architectural Iron Works*, 24 Ill. 551; *Mills v. Heeney*, 35 Ill. 173.

¹ Right to interest, see § 126.

² *Watkins v. Wassell*, 20 Ark. 410.

³ *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327. Sometimes rests in the discretion of the chancellor. *Kaye v. Bank*, 39 Ky. 261. Interest should be allowed on a mechanic's lien from the date of the filing of the claim for record. *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

time of satisfaction.⁴ The claims of subcontractors should be calculated in the same way.⁵ But interest should not be allowed prior to the time prayed for.⁶ A decree of sale itself is not effective; there must be a sale and confirmation to divest the owner of title.⁷ Where suit is brought to quiet title by the purchaser, the burden is on him to show that the sale was properly made.⁸ Persons who are interested,⁹ but not made parties, may go behind the foreclosure proceedings and contest the validity of the lien and all proceedings relating thereto.¹⁰ Mortgagees,¹¹ and assignees, becoming such prior to the filing of the complaint, are not affected unless made parties.¹² But generally a senior lienholder may foreclose his

⁴ *Johnson v. Boudry*, 116 Mass. 196.

⁵ *McDonald v. Patterson & Co.*, 84 Ill. App. 326. Where the value of the work done by a subcontractor under his contract with the principal contractor was unliquidated and incapable of ascertainment until fixed by judgment of the court, the court, in an action by such subcontractor to foreclose a mechanic's lien, is unauthorized to allow interest on his claim prior to judgment. *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312.

⁶ *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016.

⁷ *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168.

⁸ *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

⁹ **Sufficient to put on inquiry.**—The facts that a married woman was possessed of land, the legal title to which was in another, when complainants were contracting with her to furnish ma-

terials, when they were furnished, and when suits were commenced and that her name was signed to a recorded plat of the land, were sufficient to put them on inquiry as to her equitable interest in the land, on the institution of suits to foreclose the mechanic's lien; and, she not having been made a party, her interest was not affected by the decree. *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

¹⁰ *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273; *Portsmouth Sav. Bank v. Riley*, 54 Neb. 531, 74 N. W. 838.

¹¹ *General Fire Extinguisher Co. v. Lundell*, 66 Ill. App. 140; *Husted v. National Home Bldg. & Loan Assn.*, 152 Ind. 698, 51 N. E. 1067; *Union Nat. Savings & Loan Assn. v. Helberg*, 152 Ind. 139, 51 N. E. 916.

¹² *Burnham v. Raymond*, 64 App. Div. (N. Y.) 596, 72 N. Y. Supp. 300.

lien without making junior incumbrancers parties,¹³ unless otherwise provided by statute.¹⁴ The decree and order of sale will operate upon all the interest the party defendant may have in the premises.¹⁵ If he does not own the fee an order made to sell the building will be a sufficient holding that the building is personal property.¹⁶ The finding on the evidence and dismissal will be held to be a finding on the merits and not merely a nonsuit.¹⁷ Whoever purchases property pending a suit steps into the rights and liabilities of a grantor no matter what the finding may be.¹⁸ And if the case be reversed on appeal, the parties are in the same position as they were before.¹⁹ Notwithstanding what the order may say, it cannot operate otherwise than as provided by law,²⁰ even as against the party lawfully liable.²¹

§ 276. Order of sale—Parties affected—Judgment against—Setting same aside—Collateral attack.—It should not be forgotten that the decree or order of sale only binds those who

¹³ Deming-Colborn Lumber Co. v. Union Nat. Sav. & Loan Assn., 151 Ind. 463, 51 N. E. 936.

¹⁴ Union Nat. Savings & Loan Assn. v. Helberg, 152 Ind. 139, 51 N. E. 916. Plaintiff must proceed as statute provides. Only had right to redeem. Deming-Colborn Lumber Co. v. Union Nat. Sav. & Loan Assn., 151 Ind. 463, 51 N. E. 936.

¹⁵ Dobschuetz v. Holliday, 82 Ill. 371.

¹⁶ Shull v. Best (Neb.), 93 N. W. 753.

¹⁷ Doll v. Coogan, 168 N. Y. 656, 61 N. E. 1129.

¹⁸ Anglo-American Savings & Loan Assn. v. Campbell, 13 App. Cas. (D. C.) 581, 43 Am. Dec. 622.

¹⁹ Badger Lumber Co. v.

Holmes, 55 Neb. 473, 76 N. W. 174.

²⁰ Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 Pac. 519; Cutter v. Kline, 35 N. J. Eq. 534.

²¹ Holl v. Long, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522. Where several suits to enforce liens were consolidated, and one plaintiff was non-sued as to the defendant owners only, it was not error to render judgment that, as against the owners, such plaintiffs should take nothing, and pay costs; since, after the non-suit, he remained a party as against the other claimants, and they were entitled to have his claim to a portion of the contract price eliminated. Kennedy, &c.,

are parties to the suit,¹ and as persons purchasing the property pending the suit, take subject to the then existing rights, their interest may also be affected, although not made parties to the action.² The same is true in case of a person taking a mortgage or other lien; their right of action may not be lost, but their security may be taken away.³ The party acquiring an interest, either as purchaser, mortgagee or lienor before the suit is commenced may have a standing to set aside a fraudulent judgment on the lien.⁴ If the statute should require that all lienholders be made parties and they are made such, they will be bound whether or not they file answers.⁵ As a general rule, if a lien right is defeated personal judgment may be rendered.⁶ The proceedings may be arrested by motion, but a motion to arrest a judgment, as a general rule, must be grounded on some object arising on the face of the record itself; and no defect at the trial can be held under this motion, and the finding will not be disturbed if by any fair construction of its terms, it can be sustained.⁷ As a general rule, amendments to findings, orders of sale and motions to set aside are allowed, if made in the interest of justice,⁸ and if not prejudicial to a person, it may be done

Lumber Co. v. Dusenbery, 116 Cal. 124, 47 Pac. 1008.

¹ *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *M'Kim v. Mason*, 3 Md. Ch. 186; *Holl v. Long*, 34 Misc. (N. Y.) 1, 68 N. Y. Supp. 522. See previous section.

² *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748.

³ *Pittman v. Wakefield*, 90 Ky. 171, 13 S. W. 525.

⁴ *Gamble v. Voll*, 15 Cal. 507.

⁵ *Hardwick v. Royal Food Co.*, 78 Hun (N. Y.) 52, 28 N. Y. Supp. 1086.

⁶ *San Francisco Pav. Co. v.*

Fairfield, 134 Cal. 220, 66 Pac. 255; *Villaume v. Kirchner*, 85 N. Y. Supp. 377.

⁷ On motion in arrest of judgment on the ground that the larger portion of the lumber for which the lien is claimed was furnished more than six months before the lien was filed, it will be presumed that the lumber was all furnished under one general contract in which case if any of it was within the time, the lien would cover the whole. *Ferguson v. Vollum*, 1 Phila. (Pa.) 181.

⁸ *Hubon v. Bousley*, 123 Mass.

368.

without notice to him.⁹ Such action, however, is largely controlled by the statutes of the state in which the action is brought.¹⁰ A judgment in foreclosure of a mechanic's lien cannot be attacked collaterally, except by showing want of jurisdiction in the court which has rendered it.¹¹

§ 277. **Matters relating to enforcement—Writ of execution for order of sale.**—In general it may be said that the writ of execution, where that is the method of procedure,¹ or order of sale, should set forth the description of the premises and amount of the lien,² and as a general rule there may be no execution awarded for the balance due, until after a sale has been had of the property directly subject to the lien.³ In some cases, however, it has been held that the decree might be abandoned and execution as on an ordinary judgment

⁹ *McClellan v. Brinkley*, 78 Ind. 503. A prior mortgagee, who has not been in any way misled by the mistake, cannot take any advantage thereof. *Monroe v. West*, 12 Iowa 119, 79 Am. Dec. 524.

¹⁰ *Mason v. Heyward*, 5 Minn. 74; *Raven v. Smith*, 76 Hun (N. Y.) 60, 27 N. Y. Supp. 611; *Lampson v. Bowen*, 41 Wis. 484; *Hill v. La Crosse, &c., R. Co.*, 11 Wis. 214.

¹¹ *Nolt v. Crow*, 22 Pa. Super. Ct. 113; *Allen v. Sales*, 56 Mo. 28. Some attempt appears to have been made at the trial to attack the judgment referred to, on the ground that the cooking range was not a fixture; it was clearly incompetent to do this. After rendition of judgment by a court of competent jurisdiction all the issues of fact raised by the pleading are forever settled. So that

it was entirely immaterial whether the cooking range was attached to the freehold or not. The court on issue joined so found, and that was sufficient. Nor was it at all material that the house was four or five years old at the time the work, which resulted in the lien, was done. *Relly v. Hudson*, 62 Mo. 383.

¹ *Snow v. Council*, 65 Ga. 123. See Dec. & Am. Dig. tit. Mechanics' Liens, § 292.

² *Decker v. O'Brien*, 159 N. Y. 553, 54 N. E. 1090 (without opinion), Affg. 1 App. Div. (N. Y.) 81, 36 N. Y. Supp. 1079.

³ *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688; *First Baptist Church v. Andrews*, 87 Ill. 172. As to what is a final decree in such cases. *McCarthy v. Holtman*, 19 App. Cas. (D. C.) 150.

awarded.⁴ There seems to be no good reason why this rule should not be general. The purpose of an execution or order of sale is to carry into effect the order of court and realize sufficient moneys to pay the lien claimants,⁵ and the sale might be valid if no formal order of sale or writ of execution was issued.⁶ The entire matter, however, is largely controlled by statutory provisions of the forum in which the action is pending.⁷ The property must be owned by the defendant at the time the lien attaches or it is not liable.⁸ An equitable interest, however, may be proceeded against, even before the extent of such interest is judicially ascertained.⁹ If there is a lien against the interest of a tenant, and the claimant suffers the lease to expire before the writ is issued, the property is not liable.¹⁰ The owner may insist on his non-exempt property being first subjected to the lien,¹¹ and in proper cases a receiver may be appointed for the benefit of the lienor.¹² The premises described in the writ should conform to that described in the complaint,¹³ and the judgment rendered thereon.¹⁴ Resort cannot be had to external proof upon

⁴ *Richardson v. Warwick*, 7 How. (Miss.) 131.

⁵ *Throckmorton v. Shelton*, 68 Conn. 413, 36 Atl. 805; *American Savings & Loan Assn. v. Campbell*, 8 S. Dak. 170, 65 N. W. 815.

⁶ *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429.

⁷ *Kendall v. McFarland*, 4 Ore. 292; *Schmidt v. Stetler*, 21 Pittsb. Leg. J. (Pa.) 34, 2 Luz. Leg. Reg. (Pa.) 192; *Bailey v. Hull*, 11 Wis. 289, 78 Am. Dec. 706.

⁸ *Milan v. Bruffee*, 6 Mo. 635; *Mutual Ben. Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389. When seized on writ, needs no further order. *Laughlin v. Reed*, 89 Me. 226, 36 Atl. 131.

⁹ *Carey Lombard Lumber Co. v.*

Bierbauer, 76 Minn. 434, 79 N. W. 541.

¹⁰ *Stetson, &c., Mill Co. v. Pacific Amusement Co.*, 37 Wash. 335, 79 Pac. 935.

¹¹ See *Homesteads*, § 142. *King v. Hapgood Shoe Co.*, 21 Tex. Civ. App. 217, 51 S. W. 532.

¹² *Stone v. Tyler*, 67 Ill. App. 17.

¹³ *Nordyke-Marmon Co. v. Dickson*, 76 Ind. 188.

¹⁴ *Wilson v. Reuter*, 29 Iowa 176; *Schwartz v. Saiter*, 40 La. Ann. 264, 4 So. 77. A sale on execution of a house on B. Street, under a judgment on a mechanic's lien claim filed against a house on A. Street, is void. *Simpson v. Murray*, 2 Pa. St. 76.

this subject.¹⁵ In a proper case, the writ will be set aside, but it will not be done unless it is definitely shown that the executive officer has failed to comply with the law in seeking to execute the same.¹⁶ The matter of stay is only granted when the statute so provides,¹⁷ and is entirely regulated by the statute granting the same.¹⁸ There can be no writ issued for the sale of the materials. It must be shown the materials were used in connection with the erection of the building,¹⁹ under proper contract, and with proper description of the premises.

§ 278. Sale in general.—The sale is for the purpose of converting the property upon which the lien has been found to exist into money so that the same may be applied to the satisfaction of the demand. This method is the only way to enforce a compulsory payment of the debt. If a personal judgment is rendered on the debt, then the mode provided for the collection of judgments of that character will control. The manner of the sale is regulated by statutes of the various states, and the sale cannot be objected to by one not injuriously affected thereby.¹ An objection on the ground of irregularity by one entitled to object must be made as a general rule before confirmation.² And generally where the

¹⁵ *Race v. Sullivan*, 1 Ill. App. 94.

¹⁶ *Fink v. Remick*, 33 Mo. App. 624.

¹⁷ *Arrington v. Wittenberg*, 11 Nev. 285.

¹⁸ *Paine v. Putnam*, 10 Neb. 588, 7 N. W. 336.

¹⁹ *Lee v. King*, 99 Ala. 246, 13 So. 506.

¹ *Knapp v. Greenwood*, 83 Iowa 1, 48 N. W. 1055; *Pittman v. Wakefield*, 90 Ky. 171, 13 S. W. 525; *Fink v. Remick*, 33 Mo. App. 624. Where a junior lien has not

been cut off by a sale under a prior lien, the holder of the former cannot bring a bill to set aside the sale, as the intervention of equity is needless. *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454, 17 N. E. 358; *Carney v. La Crosse, &c., R. Co.*, 15 Wis. 558, 82 Am. Dec. 698. See Dec. & Am. Dig. tit. Mechanics' Liens, § 293.

² *Harbach v. Kurth*, 131 Pa. St. 177, 18 Atl. 1062, 25 W. N. C. (Pa.) 301. After judgment, execution, and sale under a mechan-

claimant has both a personal judgment and a decree of foreclosure, the property on which the lien exists should be sold before other property of the defendant.³ Only such property as is subject to the lien can be sold. However, if the work is performed upon an entire plant and it cannot be separated without manifest injury, it is within the power of a court of equity to order the entire plant sold, and it will usually do so.⁴ Where the lien is on a number of properties as an entirety, they can be separately sold, and in such case not more should be sold than will cover the lien claim and costs.⁵ After the lien has attached, the surrender of a leasehold interest will not defeat the sale.⁶

§ 279. Sale—Other incumbrances—In the absence of contrary statutory provisions the property is generally sold free from all subsequent liens, but it will not be sold so as to affect a prior incumbrancer unless he comes in and consents to be a party.⁷ If the lien is on part of the property, as for instance the building, and the incumbrances on the land, and a sale of the different interests separately would not be to the best interest of all concerned, the incumbrancer should become a party and then the proceeds may be equitably distributed.⁸

ic's lien, it is too late to object that the lien, which was on two separate houses, failed to apportion the claim between them. *Reece v. Haymaker*, 25 Pittsb. Leg. J. (N. S.) (Pa.) 74.

³ *Marks v. Pence*, 31 Wash. 426, 71 Pac. 1096.

⁴ *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43.

⁵ *Major v. Collins*, 11 Ill. App. 658. Same as in foreclosure of mortgage. *Gauhn v. Mills*, 2 Abb. N. Cas. (N. Y.) 114.

⁶ *Tracy v. Rogers*, 69 Ill. 662.

⁷ *Smith v. Shaffer*, 46 Md. 573.

⁸ *Georgia*.—*Winn v. Henderson*, 63 Ga. 365.

Iowa.—*Luce v. Curtis*, 77 Iowa 347, 42 N. W. 313.

Louisiana.—*Cordeviolle v. Hosmer*, 16 La. 590; *McDonough v. Le Roy*, 1 Rob. (La.) 173.

New Jersey.—*Newark Lime, &c. Co. v. Morrison*, 13 N. J. Eq. 133.

Texas.—*Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160; *Owens v. Heldbreder* (Tex. Civ. App.) 44 S. W. 1079; *June v. Doke*, 35 Tex. Civ. App. 240, 80 S. W. 402.

Where, in a mechanic's lien

This rule may also be followed where there is doubt as to the priority of the various liens.⁹ Generally where property is separately sold it should be separately appraised.¹⁰ Some statutes require that the property be sold free from liens. In such cases if a prior incumbrancer is made a party he cannot object to the sale.¹¹

§ 280. **Sale—Conduct and validity.**—As the lien is purely statutory, in order for a sale to be valid and a good title pass to the purchaser, it must be shown that all the provisions of the statute have been complied with.¹ If the parties interested stipulate as to terms of sale,² or the amount for which it is to be sold, this will be binding on those consenting, even though not in strict accordance with the statute. Whether or not the sale has been properly conducted may be established by evidence.³ And if the name of the defendant is disputed, it may be shown that that is the name he usually is known by.⁴ The sale is invalidated where a number of

foreclosure, it appears that the liens can only be satisfied by a sale of the property, mortgagees who have been made parties cannot object that they are not seeking foreclosure, and should not be compelled to accept the results thereof. *Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419.

⁹ This power may be exercised so long as the subject matter and the parties remain before the court, and under its jurisdiction, as well after a sale of sufficient to satisfy the primary lien as before. *Livingston v. Milderum*, 19 N. Y. 440.

¹⁰ *Citizens' Bank v. Maureau*, 37 La. Ann. 857. *Succession of Cox*, 32 La. Ann. 1035; *Wang v. Field*, 26 La. Ann. 349; *White-neck v. Noe*, 11 N. J. Eq. 321.

¹¹ *Reed v. Estes*, 113 Tenn. 200, 80 S. W. 1086. Even though the decree makes no reference to the mortgage and is silent as to the proceeds of the sale. The right of the mortgagee is remitted to the fund resulting from the sale. *Topping v. Brown*, 63 Ill. 348.

¹ Statutory provisions cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. *Wagar v. Briscoe*, 38 Mich. 587. Not a critical construction however. *Neher v. Crawford*, 10 N. Mex. 725, 65 Pac. 156.

² *Pairo v. Bethell*, 75 Va. 825.

³ *Staples v. Ryan*, 62 Fed. 635.

⁴ *Fanning v. Krapfl*, 68 Iowa 244, 26 N. W. 133.

prospective purchasers combine to prevent competition in bidding. But the lienholders may agree that one of their number shall bid in the property for the benefit of all, and this will not be held to constitute such fraudulent action as will invalidate the sale.⁵ The court has power to order the sale only in the method provided by law.⁶ Upon defendant's demand, the court may order a part of the premises to be sold, if that will be sufficient to satisfy the lien.⁷ The court may order the performance of all incidental matters necessary to the sale as contemplated by the statute, and where the funds remain on hands for some time it may order the payment of taxes.⁸ The time of sale is regulated by statute and must be complied with, unless all interested parties consent to a sale at another time.⁹ The effect of a sale, properly made, is to transfer all the rights of the parties to the suit in the property to the purchaser.¹⁰ But the title will not vest in the purchaser nor the sale become fully effective until confirmed.¹¹

§ 281. **Confirmation of sale.**—Confirmation will cure a great many defects in the method of sale, but where the errors have reference to the matter of priority, it is said that a more equitable way is to vacate the same, and to have the property re-sold.¹ All parties are bound to know the law and the practice of the court and if the sale does not conform thereto

⁵ *Gulick v. Webb*, 41 Neb. 706, 60 N. W. 13, 43 Am. St. 720.

⁶ *Hines v. Chicago Bldg. & Mfg. Co.*, 115 Ala. 637, 22 So. 160.

⁷ *Broyhill v. Gaither*, 119 N. Car. 443, 26 S. E. 31.

⁸ *Kahler v. Betterton* (Tex. Civ. App.) 51 S. W. 289.

⁹ *Jarrett v. Hoover*, 54 Neb. 56, 74 N. W. 429.

¹⁰ *Deming-Colborn Lumber Co. v. Union Nat. Savings & Loan*

Assn. (Ind.) 49 N. E. 28, 151 Ind. 463, 51 N. E. 936; *Koken Iron Works v. Robertson Ave. R. Co.*, 141 Mo. 288, 44 S. W. 269; *Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 315; *American Banking & Trust Co. v. Lynch*, 10 S. Dak. 410, 73 N. W. 908.

¹¹ See § 281.

¹ *Dingledine v. Hershman*, 53 Ill. 280.

it may be set aside.² Constructive notice as to the time of confirmation is sufficient; actual notice is not required.³ The matter being in a court of equity whose duty it is to protect all parties, as much as possible, the sale should be set aside if made for a greatly inadequate price,⁴ or there is any fraud connected therewith.⁵ The mere fact that the owner has attempted to redeem the property will not estop him from contesting the validity of the sale.⁶ Sales are usually set aside for sufficient cause, on motion and notice to interested parties.⁷ The purchaser at the sale, as a general rule gets only such a title as the proceedings give him. Unless other lien holders have been properly made parties, he will only take the title that the owner had at the time the lien attached.⁸ And in order for the purchaser to maintain his title he must show that the statute has been complied with.⁹ He is subrogated to whatever rights the defendant may have and may set up any defense that the defendant could have asserted against any claim or demand.¹⁰ While his title relates back to the time the lien became effective, the purchaser cannot sue the owner

² Kizer Lumber Co. v. Mosley, 56 Ark. 544, 20 S. W. 409.

³ Rogers, &c. Hardware Co. v. Cleveland Bldg. Co. 32 S. W. 1, 132 Mo. 442, 34 S. W. 57, 53 Am. St. 494, 31 L. R. A. 335.

⁴ Rogers, &c. Hardware Co. v. Cleveland Bldg. Co. 32 S. W. 1, 132 Mo. 442, 34 S. W. 57, 53 Am. St. 494, 31 L. R. A. 335.

⁵ Gamble v. Voll, 15 Cal. 507.

⁶ Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031, affirmed, 49 Ill. App. 503.

⁷ Turney v. Saunders, 8 Ill. 239.

⁸ California.—Purser v. Cady (Cal.) 49 Pac. 180.

Iowa.—Shields v. Keys, 24 Iowa 298.

Pennsylvania.—Mustin v. Vanhook, 3 Whart. (Pa.) 574; Twelves v. Williams, 3 Whart. (Pa.) 485, 31 Am. Dec. 542; Rogers v. Klingler, 3 Whart. (Pa.) 332. Title as shown by record controls. Fahn v. Bleckley, 55 Ga. 81. A purchaser of a leasehold at a sale for the enforcement of a mechanic's lien on it, only acquires the estate held by the lessee subject to the conditions of the lease. Reed v. Estes, 113 Tenn. 200, 80 S. W. 1086.

⁹ Wagar v. Briscoe, 38 Mich. 587.

¹⁰ He is subrogated to all the rights of the defendant-owner. National Translt Co. v. Weston, 121 Pa. St. 485, 15 Atl. 569;

for damages done the property.^{10a} And his title can only be impeached by a person who is not a party to the suit.¹¹ Of course, if the sale should have been wrongfully made, then parties to the suit might at any time object, but parties to the suit will not ordinarily be permitted to object, if the sale is regularly made.¹² Upon the setting aside of a void sale, the purchaser should be placed in statu quo.¹³ The statutes generally make provision for the protection of purchasers at void judicial sales.¹⁴ The general equity powers of the court will upon confirmation of sale permit the court to put the purchaser in possession or, for sufficient reason, relieve him from his purchase.¹⁵

§ 282. **Removal of building.**—As a general rule, the building or improvement into which the materials go or for which they were furnished, become a part of the real estate and cannot be separated therefrom.¹ But under some statutes,

Owens v. Heldbreder (Tex. Civ. App.) 44 S. W. 1079. The purchaser is entitled to set up as a defense to a mortgage executed and recorded prior to the filing of the lien, that such mortgage was without consideration, and that an assignment thereof to plaintiff was invalid. *Nichols v. Hill*, 6 Th. & C. (N. Y.) 335.

^{10a} *Van Buskirk v. Summitville Min. Co.*, 38 Ind. App. 198, 78 N. E. 208.

¹¹ *Bartlett v. Bilger*, 92 Iowa 732, 61 N. W. 233; *Horton v. St. Louis, &c. R. Co.*, 84 Mo. 602.

¹² *Sexton v. Alberti*, 10 Lea (Tenn.) 452. The assignee of a mortgage is in the same position that his assignor was, and if assignor was a party, assignee is bound. *Smith v. De Pontia*, 8 Kan. App. 459, 54 Pac. 514.

¹³ *Powell v. Rogers*, 11 Ill. App. 98. He must receive back his purchase money, with interest, and be charged with the reasonable, rents and profits, less the taxes paid by him. *Charleston L. &c. Co. v. Brockmeyer*, 23 W. Va. 635.

¹⁴ *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383.

¹⁵ *Suydam v. Holden*, 11 Abb. Pr. (N. S.) (N. Y.) 329; *Van Buskirk v. Summitville Min. Co.*, 32 Ind. App. 198, 78 N. E. 208. Where the validity of the judgment of foreclosure is doubtful, the purchaser at the sale will not be compelled to take the title. *Sprickerhoff v. Gordon*, 120 App. Div. (N. Y.) 748, 105 N. Y. Supp. 586.

¹ *Smith v. Phelps*, 63 Mo. 585. Property subject to lien, see § 12.

where the building or improvement is put thereon by a lessee, it may be removed, and in such case, the purchaser succeeds only to the rights of the lessee.² Where the lien exists on the building separate from the land, a court of equity may grant a right to remove the building so as not to interfere between the equitable rights of the parties.³ But where it can be removed, it can only be done within the time fixed by law,⁴ and if the statute fixes the time, it need not be set out in the decree.⁵

§ 283. **Redemption—Description in deed.**—In some states, the equitable right of redemption⁶ is recognized,⁷ but in others, it is denied even though the proceeding is regarded as an equitable one,⁸ unless the right is specifically reserved by the

Priority of liens as to improvements, see § 153. Provisions of lease, see § 141. Right to remove as means of enforcement of lien, see § 198.

² *Oswald v. Buckholz*, 13 Iowa 506. A subsequent purchaser cannot defeat existing rights. *Shull v. Best* (Neb.) 93 N. W. 753. And, in case the debtor has no permanent interest in the land, the purchaser of the building at the sale on the execution may enter on the land and remove the building. *Dean v. Pyncheon*, 3 Chand. (Wis.) 9.

³ *Otley v. Haviland*, 36 Miss. 19.
Replevin.—One purchasing a building under a decree in a mechanic's lien suit providing for its sale separate from the land obtains title thereto, and can maintain a replevin therefor, if it is not occupied as a family dwelling. *Shull v. Best* (Neb.) 93 N. W. 753.

⁴ *Priebatsch v. Third Baptist Church*, 66 Miss. 345, 6 So. 237. Cannot be removed before the expiration of the time of redemption. *Grand Opera House Co. v. McGuire*, 14 Mont. 558, 37 Pac. 607.

⁵ *Grand Opera House Co. v. McGuire*, 14 Mont. 558, 37 Pac. 607.

⁶ **Equity of Redemption.**—A right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed, of the money secured by the mortgage to be paid, by paying the amount of the debt, interest and costs. *Bouv. L. Dict.*

⁷ *Connecticut Mut. Life Ins. Co. v. Stewart*, 95 Ind. 588; *Dean v. Pycheon*, 3 Pinn. 17, 3 Chand. (Wis.) 9.

⁸ **Illinois.**—*Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Schmidt v. Williams*, 89 Ill. 117; *Link v. Architectural Iron Works*,

statute,⁹ and where allowed, the right must be taken advantage of within the time limit.¹⁰ But the time need not be fixed in the decree.¹¹ From the nature and character of the right of redemption, it is plain that no one can claim the right unless he has some legal estate in the premises.¹² A simple judgment creditor can not redeem by virtue of his lien,¹³ nor can one who merely holds the legal title as security, claim the right to redeem as against the holder of the equitable title.¹⁴ However, some of the statutes, aided by a liberal construction on the part of the courts, have broadened the right so as to enable parties in interest to protect their rights,¹⁵ and redeem in cases where the right would otherwise be denied.¹⁶ But it is held that a person cannot share the proceeds and also claim the right to redeem the property.¹⁷ The mere fact, however, that he is made a party defendant will not bar him of his right to redeem.¹⁸ The formal conveyance

24 Ill. 551; *Armsby v. People*, 20 Ill. 155.

Iowa.—*State v. Eads*, 15 Iowa 114, 83 Am. Dec. 399.

⁹ *Keller v. Coman*, 162 Ill. 117, 44 N. E. 434; *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 1038.

¹⁰ When ignorance of time within which to redeem will not defeat right. *Seymour v. Davis*, 35 Conn. 264. Within one year from the sale. *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280; *State v. Kerr*, 51 Minn. 417, 53 N. W. 719.

¹¹ *Milner v. Norris*, 13 Minn. 455.

¹² *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280.

¹³ *Diddy v. Rissner*, 55 Iowa 699, 8 N. W. 655.

¹⁴ *Sheppard v. Messenger*, 107 Iowa 717, 77 N. W. 515.

¹⁵ *Whitney v. Higgins*, 10 Cal.

547, 70 Am. Dec. 748; *Gamble v. Voll*, 15 Cal. 507.

¹⁶ The holder of a junior mechanic's lien, filed after an action to foreclose a senior mechanic's lien was commenced, can redeem from such foreclosure sale. *Jones v. Hartsock*, 42 Iowa 147.

Where a junior incumbrancer was not made a party to the proceeding to foreclose a mechanic's lien, his right to redemption, or any other right he might have, was not cut off by the decree of foreclosure. *Evans v. Tripp*, 35 Iowa 371.

¹⁷ *Phelps v. Pope*, 53 Iowa 691, 6 N. W. 42. A party cannot redeem from his own sale. *McCullough v. Rose*, 4 Ill. App. 149.

¹⁸ *Boynton v. Pierce*, 49 Ill. App. 497.

to the purchaser should contain a specific description of the premises similar to that in ordinary deeds.¹⁹ The sheriff or master is generally required to make the conveyance.²⁰

§ 284. **Proceedings and liability where lien right fails to pay claim.**—The person contracting the debt,¹ is not released from liability for the debt, until it is paid.² Whether there can be a judgment for the deficiency that may exist after the property has been sold and the proceeds applied on the indebtedness in the same cause of action or whether a separate action must be prosecuted, is a question upon which the courts are not in accord. This divergence of opinion results largely from the difference in the statutes of the several states, not alone as to the enforcement of the lien, but as to the nature of the action to enforce the same, whether it is legal or equitable. Generally where the action is considered equitable, the court in the same proceeding may, if there has been personal service, give judgment for a deficiency.³ But some courts, under other statutes, have arrived at a different conclusion.⁴ In no case, however, is the bringing of an action before foreclosure a waiver of any debt.⁵ While none of the courts hold that there can be no recovery against the person contracting the debt where the lien fails, yet on the question whether there can be recovery of a personal judgment in the same action, if there is a failure to establish a lien, there is quite a contrariety of opinion; the New York courts and some others

¹⁹ *Munger v. Green*, 20 Ind. 38.

²⁰ *Randolph v. Leary*, 3 E. D. Smith (N. Y.) 637, 4 Abb. Pr. (N. Y.) 205; *Smith v. Corey*, 3 E. D. Smith (N. Y.) 642, 4 Abb. Pr. (N. Y.) 208.

¹ *Wyman v. Quayle*, 9 Wyo. 326, 63 Pac. 988; *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 111 App. Div. (N. Y.) 353, 98 N. Y. Supp. 128.

² *Orr v. Wolff*, 71 App. Div. (N. Y.) 614, 75 N. Y. Supp. 549. See Dec. & Am. Dig. tit. Mechanics' Liens, § 301.

³ *Ford v. Springer Land Assn.*, 8 N. Mex. 37, 41 Pac. 541.

⁴ *Johnson v. Frazee*, 20 S. Car. 500.

⁵ *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

holding there can be no such recovery.⁶ The only personal judgment contemplated is for a deficiency of proceeds where the lien has been established.⁷ Even though the proceeding is regarded as being purely equitable, yet it is governed by the statute.⁸ And only such relief can be given as the statute provides. Under later statutes, a personal judgment is al-

⁶ **Colorado.**—Hart & Schlenger Corp. v. Mullen, 4 Colo. 512.

Indiana.—Falkner v. Colshear, 39 Ind. 201; McKinney v. Springer, 6 Blackf. (Ind.) 511.

Mississippi.—Hursey v. Haslam, 45 Miss. 133.

New York.—Burroughs v. Tostevan, 75 N. Y. 567; Castelli v. Trahan, 77 App. Div. (N. Y.) 472; 78 N. Y. Supp. 950; Donnelly v. Libby, 1 Sweeny (31 N. Y. Super.) 259; Gallick v. Engelhardt, 36 Misc. (N. Y.) 269, 73 N. Y. Supp. 309; Hickey v. O'Brien, 11 Daly (N. Y.) 292; Jones v. Walker, 1 Sheld. (N. Y.) 350; Kelsey v. Rourke, 50 How. Pr. (N. Y.) 315; Mowbray v. Levy, 85 App. Div. (N. Y.) 68, 82 N. Y. Supp. 959; Scerbo v. Smith, 16 Misc. (N. Y.) 102, 38 N. Y. Supp. 570; Fogarty v. Wick, 8 Daly (N. Y.) 166; Weyer v. Beach, 79 N. Y. 409; Sinclair v. Fitch, 3 E. D. Smith (N. Y.) 677; Childs v. Bostwick, 65 How. Pr. (N. Y.) 146, 12 Daly (N. Y.) 15.

Washington.—Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109.

⁷ Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109. See also, Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923;

Koeppel v. Macbeth, 97 App. Div. (N. Y.) 299, 89 N. Y. Supp. 969; Green v. Sprague, 120 Ill. 416, 11 N. E. 859; Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. (N. Y.) 358, 98 N. Y. Supp. 128; Weyer v. Beach, 79 N. Y. 409, is directly in point. There, Judge Rapello, delivering the opinion of the court, said: "This point has several times been decided by this court. The proceeding is statutory, and can only be resorted to in a case falling within the statute, that is, where a mechanic's lien exists. The main object of the proceeding is to enforce the lien, and the power to render a personal judgment is merely incidental to the main purpose, and to avoid the necessity of resorting to a separate action. But where no lien exists, this form of proceeding cannot be resorted to for the purpose of enforcing a mere personal contract between the parties, and an allegation of the existence of the lien does not authorize the substitution of this proceeding in place of the proper common law action." Cody v. White, 34 Misc. (N. Y.) 638, 70 N. Y. Supp. 589.

⁸ Thomas v. Sahagian, 57 Hun (N. Y.) 591, 10 N. Y. Supp. 874.

lowed, if the prayer of the complaint is for that kind of relief,⁹ and this applies as well to public institutions as to private individuals.¹⁰ As a matter of course if the lien fails, and the court has no jurisdiction such as will permit it to render a judgment in personam, then there can be no personal judgment.¹¹ A personal judgment has been sustained where the right to a lien exists, but for some reason it has not been foreclosed, and jurisdiction was acquired.¹² The prevailing opinion, however, is that if the court once has jurisdiction of the parties, and the right to a lien fails, personal liability remains for which a judgment may be rendered.¹³ A voluntary

⁹ *Ryan v. Train*, 95 App. Div. (N. Y.) 73, 88 N. Y. Supp. 441; *Steuerwald v. Gill*, 85 App. Div. (N. Y.) 605, 83 N. Y. Supp. 396. It does not allow a recovery against others than the person with whom the contract to furnish labor or materials was made. *Altieri v. Lyon*, 27 Jones & Sp. (N. Y. Super. Ct.) 110, 13 N. Y. Supp. 617.

¹⁰ *Terwilliger v. Wheeler*, 81 App. Div. (N. Y.) 460, 81 N. Y. Supp. 173.

¹¹ *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785; *Cameron v. Marshall*, 65 Tex. 7; *Bullders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. 193.

¹² *Wick v. Ft. Plain, &c. R. Co.*, 27 App. Div. (N. Y.) 577, 50 N. Y. Supp. 479; *Thomas v. Sahagian*, 57 Hun (N. Y.) 591, 10 N. Y. Supp. 874; *Crouch v. Moll*, 55 Hun (N. Y.) 603, 8 N. Y. Supp. 183.

¹³ *Alabama*.—*Sullivan Timber Co. v. Brushagel*, 111 Ala. 114, 20 So. 498; *Bedsole v. Peters*, 79 Ala.

133; *McGeever v. Harris & Sons*, 148 Ala. 503, 41 So. 930.

Arkansas.—*Brugman v. McGuire*, 32 Ark. 733.

Dakota.—*McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

Iowa.—*Kimball v. Bryan*, 56 Iowa 632, 10 N. W. 218.

Kansas.—*Haight v. Schuck*, 6 Kan. 192.

Minnesota.—*Smith v. Gill*, 37 Minn. 455, 35 N. W. 178.

Missouri.—*Mulloy v. Lawrence*, 31 Mo. 533; *Patrick v. Abeles*, 27 Mo. 184.

New Jersey.—*Tomlinson v. De-graw*, 26 N. J. L. 73.

Tennessee.—*Dollman v. Collier*, 92 Tenn. 660, 22 S. W. 741.

Washington.—*Spaulding v. Burke*, 33 Wash. 679, 74 Pac. 829; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Littell v. Miller*, 8 Wash. 566, 36 Pac. 492.

Wisconsin.—*More v. Ruggles*, 15 Wis. 275; *Ponti v. Eckels*, 129 Wis. 26, 108 N. W. 62.

Even though the law granting the lien is unconstitutional.

relinquishment of the right to a lien merely and not of the debt, does not affect the personal liability of the owner.¹⁴

§ 285. **Proceedings when defective title defeats sale of property on execution to satisfy lien—Ohio statute.**—Section 3189 of the Ohio statute provides: If in an action for the enforcement of such lien, the property subject thereto will not sell on execution, by reason of a defective title, the court shall order the officer returning the execution to rent or lease such property, but subject to all prior bona fide liens, until the rents and profits thereof pay such lien; and the rents shall be made payable to such officer, or his successor in office, and when paid shall be forthwith returned by him into court, for distribution to the party or parties thereto entitled.¹⁵

§ 286. **Destruction of structure—Liability to subcontractor.**—Courts that hold that there is no liability where there is no lien, generally also hold that there can be no personal recovery if the lien at one time existed, and afterwards is lost.¹ Generally where the property is of such a character that it cannot be made subject to a lien, a personal judgment cannot be rendered in an action on the lien. Some other course must be pursued.² The liability of the owner to a subcontractor depends solely on the validity of the lien,³ and hence if the lien fails, the owner cannot be held personally, because

Koepke v. Dyer, 80 Mich. 311, 45 N. W. 143.

¹⁴ Finch v. Turner, 21 Colo. 287, 40 Pac. 565.

¹⁵ 74 Ohio Laws c. 168, § 6; S. & C. 835.

¹ New York.—Glacius v. Black, 67 N. Y. 563; Darrow v. Morgan, 65 N. Y. 333; Maltby v. Greene, 1 Keyes (N. Y.) 548, 3 Abb. Dec. (N. Y.) 144; Schacttler v. Gardner, 41 How. Pr. (N. Y.) 243; Mc-

Graw v. Godfrey, 56 N. Y. 610; Barton v. Herman, 8 Abb. Pr. (N. S.) (N. Y.) 399, 3 Daly (N. Y.) 320.

² Bouton v. McDonough County, 84 Ill. 384; Secrist v. Delaware County, 100 Ind. 59. County Court House. Quinn v. Allen, 85 Ill. 39. County Bridge. Loring v. Small, 50 Iowa 271, 32 Am. 136.

³ Frost v. Falgetter, 52 Neb. 692, 73 N. W. 12.

there is no privity between the subcontractor and the owner;⁴ and this is true, even where the statute makes the owner liable, in cases where the contractor fails to do some act required by the lien act; nevertheless, the subcontractor must recover by virtue of the act creating a lien.⁵ However, if the statute makes the contractor the agent of the owner, then a personal judgment can be rendered against the owner.⁶ But still, the subcontractor must show that he is within the statute. If the owner has sufficient funds in his hands belonging to the principal contractor to meet the subcontractor's claim, then, under some statutes, a judgment may be rendered personally against the contractor and owner,⁷ and if the statute compels the owner to retain funds and likewise permits a personal judgment, then, of course, a personal judgment against the owner may be rendered and enforced.⁸ If the statute requires the owner to take a bond, for the protection of subcontractors, and he fails to do so, he will be personally liable to the subcontractors for the debt,⁹ the subcontractor showing that he is within the terms of the statute.¹⁰

⁴ **Colorado.**—*Hume v. Robinson*, 23 Colo. 359, 47 Pac. 271; *Lowrey v. Svard*, 8 Colo. App. 357, 46 Pac. 619.

Dakota.—*McMillan v. Phillips*, 5 Dak. 294, 40 N. W. 349. He can have a personal judgment against the contractor, but not against the owner. *Williams v. Porter*, 51 Mo. 441. In a suit by a subcontractor to enforce a mechanic's lien, it was held that a general judgment against the owner of the property for the debt was erroneous. *Heltzell v. Hynes*, 35 Mo. 482.

New York.—*Schneider v. Ho-bein*, 41 How. Pr. (N. Y.) 232.

Tennessee.—*Taylor v. Tennessee Lumber Co.*, 107 Tenn. 41, 63 S. W. 1130.

⁵ *Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304, 65 Am. St. 177; *Santa Clara Valley Mill, &c. Co. v. Williams* (Cal.) 31 Pac. 1128; *Southern California Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516.

⁶ *Watson v. Noonday Min. Co.*, 37 Ore. 287, 55 Pac. 867, 58 Pac. 36, 60 Pac. 994.

⁷ *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

⁸ *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728; *Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

⁹ *Gibbs v. Tally* (Cal.) 63 Pac. 168.

¹⁰ Under Code Civ. Proc. Cal., § 1203, requiring a bond, in case of a building contract, in an

§ 287. **Personal judgment, when may be obtained.**—In a previous section,¹ it was shown to be the general rule that a personal judgment could be taken against a defendant when personal service was had on him. Sometimes this matter is deferred until it is seen whether or not the money can be recovered from the property itself. This is especially true where any other than the contractor himself brings the action. But if the contractor himself brings the action, then there would be the obligation on the debt as well as the lien, and personal judgment might be taken on the debt, bearing in mind always that in order to take a personal judgment, there must be personal service.^{1a} And furthermore, there must be a liability for the debt by the person against whom judgment is

amount equal to at least 25 per cent. of the contract price, inuring to the benefit of persons performing labor and furnishing materials for the contractor, and providing as limit of damages, in case of a bond, the value of labor and materials furnished, not exceeding the amount of the bond, and declaring that any failure to comply with the provisions of the section shall render the owner and contractor liable to material men and laborers entitled to liens on the property, the measure of damages, in the absence of a bond, is the amount of the claim for labor or material, not exceeding 25 per cent. of the contract price. *Gibbs v. Tally* (Cal.) 63 Pac. 168.

¹ See § 284. See Dec. & Am. Dig. tit. Mechanics' Liens, §304.

^{1a} *Parish v. Murphy*, 51 Ga. 614; *Martin v. Berry*, 159 Ind. 566, 64 N. E. 912; *McHale v. Maloney*, 67 Neb. 532, 93 N. W. 677;

Pickens v. Polk, 42 Neb. 267, 60 N. W. 566; *Hall Terra Cotta Co. v. Doyle*, 133 N. Y. 603, 30 N. E. 1010; *Hubbell v. Schreyer*, 56 N. Y. 604, 15 Abb. Pr. (N. Y.) 300; *Smith v. Coe*, 29 N. Y. 666. Even where statute provides that a personal judgment may be taken against any party to the suit, no personal judgment can be rendered unless it is the debt of the party against whom judgment is sought. *Kane v. Hutkoff*, 81 App. Div. (N. Y.) 105, 81 N. Y. Supp. 85; *Ringle v. Wallis Iron Works*, 86 Hun (N. Y.) 153, 33 N. Y. Supp. 398; *Richards v. Lewisohn*, 19 Mont. 128, 47 Pac. 645. In all instances the court must have acquired jurisdiction by personal services. *Knauber v. Fritz*, 5 Ohio Dec. (Re.) 410, 1 Wkly. L. Bull. (Ohio) 362, 5 Am. L. Rec. 432; *Hallahan v. Herbert*, 11 Abb. Pr. (N. S.) (N. Y.) 326, 4 Daly (N. Y.) 209; *Security Nat. Bank v. St. Croix Power Co.*, 117

rendered.² However, a judgment by default cannot be taken for a different amount from that prayed for in the petition.³ Of course the party may bring himself within the jurisdiction of the court so as to permit a personal judgment by doing something that amounts to an entry of his appearance.⁴ In some states,⁵ it is held that a personal judgment in no case can be rendered until it is first shown that there is a right to a lien, and then only to the extent of the lien established.⁶

Wis. 211, 94 N. W. 74. A subcontractor, materialman, or workman between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed on the owner, is not entitled to a personal judgment against the owner, but the judgment should be personal against the original contractor and a decree establishing the lien and ordering a sale. *Alberti v. Moore* (Okla.), 93 Pac. 543.

² **No implied debt.**—The fact that a loan company, as a condition on which a loan for the erection of buildings on land offered as security required that the contemplated improvements should conform to plans submitted with the application for the loan, did not make the company a promoter of such improvements, so as to subject it to a direct liability, to the amount paid by it out of the loan for a mortgage which was a paramount lien on the land, to holders of mechanic's liens created by reason of the improvements. *Rogers v. Central Loan & Trust Co.*, 49 Neb. 676, 68 N. W. 1048.

³ *Lowe v. Turner*, 1 Idaho 107;

Dusick v. Meiselbach, 118 Wis. 240, 95 N. W. 144.

⁴ **Making defense.**—In an action brought under the Mechanics' Lien Law (Pamph. L. 1898, p. 547, 23, 24), where "legal service" of the summons has been made upon a non-resident builder, and such builder then appears generally in the action or makes defense upon the merits, he thereby submits himself to the jurisdiction of the court, and if the verdict goes against him, the resulting judgment is to be a "general" judgment binding upon such builder in personam. *Smith v. Colloty*, 69 N. J. L. 365, 55 Atl. 805.

Filing disclaimer.—Error in ordering execution to issue, if the property to which a mechanic's lien attached, did not satisfy the judgment against one who was not shown to be personally liable, is cured by filing a disclaimer by the execution creditor. *Pearce v. Albright*, 12 N. Mex. 202, 76 Pac. 286.

⁵ See § 284.

⁶ *Kruger v. Braender*, 3 Misc. (N. Y.) 275, 23 N. Y. Supp. 324; *Murphy v. Watertown*, 112 App. Div. (N. Y.) 670, 99 N. Y. Supp. 6.

The claim of a mechanic for damages and breach of contract is a separate cause of action from that of the lien, but under the codes of many states the action can be joined with an action in foreclosure, and in that way where proper service has been made, a personal judgment can be rendered.⁷ But such action must be tried according to its nature, if equitable by the court, if common law by a jury.⁸ This is the rule established by the Federal Courts.⁹ The action is generally regarded as a statutory proceeding and the claimant is entitled only to the relief given by the statute and which he prays for thereunder in his petition.¹⁰ The fact that the judgment does not finally dispose of the case will not affect the right, as a general rule, to render a personal judgment against the party liable.¹¹ If the contract provides for payment in other than money, the court will determine the amount of the owner's liability and render a judgment therefor.¹²

§ 288. Remedy of subcontractor when his contractor or the owner refuses to pay—Ohio statute.—Under section 3200 of the Ohio statutes, if a head contractor or subcontractor neglect

⁷ *Doll v. Coogan*, 168 N. Y. 653, 61 N. E. 1129.

⁸ *Deane Steam Pump Co. v. Clark*, 87 App. Div. (N. Y.) 459, 84 N. Y. Supp. 851.

⁹ *Russell v. Hayner*, 130 Fed. 90, 64 C. C. A. 424.

¹⁰ *Kennedy, &c. Lumber Co. v. Priet*, 115 Cal. 98, 46 Pac. 903. In an action to foreclose a mechanic's lien the proceedings are wholly statutory, and must conform to the statute regulating the practice in such actions; and where there is no prayer for such relief in the complaint, and the judgment contains no provision for ascertaining a deficiency up-

on the sale or for rendering personal judgment therefor, it is reversible error to enter a judgment, which, in form is a personal judgment against the defendant, for the amount found to be due. *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

¹¹ As where suit is brought against the owner and contractor, a judgment may be rendered against the owner, although the matter is left open between the complainant and contractor. *Harris v. Harris*, 18 Colo. App. 34, 69 Pac. 309.

¹² *Dowdney v. McCullom*, 59 N. Y. 367.

or refuse to pay, within five days after his assent to or adjustment of any claim, the amount thereof, and costs incurred, to the subcontractor or material man, laborer or mechanic, the owner, board, officer or clerk or agent thereof, shall pay, when due, the whole or a pro rata amount thereof as the case may be, as above provided out of payments subsequently falling due, and on his failure so to do, within ten days thereafter, the subcontractor or material man, laborer, mechanic or person furnishing material may recover against the owner, in an action for money had or received, when due, the whole or a pro rata amount, as the case may be, of his claim or estimate, not exceeding in any case the balance due to the principal contractor.¹³

§ 289. **Personal liability of the owner under the Indiana statute.**—The provision of the Indiana statute as to the personal liability of the owner is as follows: Any subcontractor, journeyman or laborer employed in erecting, altering, repairing or removing any house, mill, manufactory or other building or bridge, reservoir, system of waterworks, or other structure, or in furnishing any material or machinery therefor, may give to the owner thereof, or, if said owner is absent, to his agent, notice in writing, particularly setting forth the amount of his claim and services rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount which may be due, and may thereafter become due from him to the employer, which may be recovered in an action whenever an amount equal to such claim, over other claims having priority, shall be due from such owner to the employer. And any such subcontractor, journeyman or laborer, by giving notice as above provided, setting forth the amount of labor he has engaged to perform, or of materials or machinery he has engaged to furnish in erecting, alter-

¹³ 97 Ohio Laws, 502. See form, § 215.

ing, repairing, or removing of any of the buildings, and other structure(s) above described, shall have the same rights and remedies against such owner for the amount of such labor performed, or materials or machinery furnished, after said notice is given, as are above secured and provided, (for those) who serve notice after the labor is performed or the materials or machinery furnished. And whenever an action is brought against an owner, in pursuance of the provisions of this section, all subcontractors, journeymen and laborers who have performed labor or furnished materials or machinery, and given notice as herein required, may become parties to such action; and if, upon final judgment against such owner, the amount recovered and collected shall not be sufficient to pay said claimants in full, the same shall be divided among them pro rata.¹ This statute is to be liberally construed^{1a} in favor of those who show that they have brought themselves within its terms. But there can be no personal judgment without proof that the notice required by this section was duly served.^{1b}

1. *Nature of lien and who may have.*

The above provision, while put in the mechanics' lien act, does not in fact give any lien whatever upon the property, unless it might be considered that after the notice is given, a lien attaches to the fund that is in the hands of the owner, and that he becomes personally responsible therefor. Persons coming within its provisions are specifically classed as subcontractors, journeymen or laborers, and is probably not as broad as the classes included in the statute relating to the lien on the property. The statute must be followed, and it is held that the giving of the notice of the intention to hold a lien will not be such a compliance with this section as will

¹ Acts 1909, Sec. 8, re-enacting
Burns 1908, Sec. 8307.

^{1a} *Gilman v. Gard*, 29 Ind. 291.

^{1b} *Lawton v. Case*, 73 Ind. 60;
Farrell v. Lafayette etc. Co., 12
Ind. App. 326, 40 N. E. 25.

make the owner personally liable.^{1c} Generally the statute applies to persons of the designated classes furnishing either labor or materials.²

2. *Kind of services.*

The services for which the liability attaches under this statute, are those incurred in erecting, altering, repairing or removing the structure mentioned in the statute, or furnishing any material or machinery therefor.³ If the labor is for another purpose than that mentioned in the statute, no personal liability can be enforced against the owner.

3. *Kind of structures.*

The statute enumerates a house, mill, manufactory, or other building or bridge, reservoir, system of waterworks or other structure, as the kind of structures upon which the labor is to be done or toward which material is to be furnished, before a lien may attach. It will be observed that the class here enumerated is not as large as that under the statute granting a lien on the property for such structures as sidewalks, walks, stiles, wells, drains, sewers, cisterns, etc., and there may be some question whether such matters would be included, unless the services were performed under a contract connected with a principal building as an appurtenant thereto. No personal liability can be fixed upon a public corporation for the erection of a jail,⁴ school house,⁵ or other public building by giving such a notice.

^{1c}Crawford v. Crockett, 55 Ind. 150; Crawford v. Crockett, 55 Ind. 220; Lawton v. Case, 73 Ind. 60. 220.

²O'Halloran v. Leachey, 39 Ind. 150; Crawford v. Crockett, 55 Ind. 220.

³O'Halloran v. Leachey, 39 Ind.

⁴Secrist v. Board, 100 Ind. 59.

⁵Jeffries v. Myers, 9 Ind. App. 563; 37 N. E. 301.

4. *Contractor's bond.*

Where the contractor gives a bond containing an undertaking to pay for all labor and materials used in the construction of a building, both principal and sureties are personally liable in a direct action on such bond by subcontractors, laborers or material men.⁶

§ 290. **Personal liability under Indiana statute—Notice.**—The right to pursue the owner personally only attaches when a notice is given to the owner. If the owner is absent then it will be sufficient to give the notice to his agent. Since the right to pursue the owner, as well as the amount that may be recovered, depends upon this service, a strict compliance with the statute is required. A copy of the notice should be preserved by the person giving the same, as well as a memorandum of the time of service, and the person to whom the notice was given. In no case should the notice be given to an agent unless the owner is absent. This means that the owner must be in such a place that service cannot quickly and properly be made on him. The first element of the notice is, that it should be in writing. A personal notice would not satisfy the requirements of the statute. Neither would a notice under a previous section of the statute of an intention to hold a lien, be sufficient,¹ The second requisite is, that the notice must set forth the amount of the claim, and the services rendered, for which the employer is indebted to him. This need not under the decisions of this state be an itemized account, but it should be such a statement as will clearly show the amount for which it is sought to hold the owner responsible.^{1a} Courts say, that

⁶ *Gwinn v. Wright*—Ind. App.—86 N. E. 453; *Ochs v. Carnahan*,—Ind. App.—80 N. E. 163; *Williams v. Markland*, 15 Ind. App. 672, 44 N. E. 562; *Brown v. Markland*, 22

Ind. App. 652, 53 N. E. 295; *Jeffries v. Myers*, 19 Ind. App. 563, 37 N. E. 301.

¹ *Crawford v. Crockett*, 55 Ind. 220; *Lawton v. Case*, 73 Ind. 60.

^{1a} *Gilman v. Gard*, 29 Ind. 291.

this notice must show that the work was done or the materials were furnished to a contractor having a contract with the owner, and state the amount due. It ought also to give some idea of where the work was performed, but it is not necessary to describe the premises, and it need not be recorded.² When the notice is once properly served then the owner can no longer safely pay any portion that he may owe the contractor, without becoming personally liable for whatever is due and coming to the contractor, at the time notice is given.³ But if the liability of the owner to the contractor has ceased, even though it be by an assignment by the contractor of all his property, including this claim, for the benefit of creditors, the service of notice on such owner will not make him personally liable to the workmen.³ This giving of notice only affects the personal liability of the owner—it does not affect the right to the lien. There is no particular time designated as to when the notice must be given. The only requisite to make it effective is, that it be given while the owner is still indebted to the contractor.⁴ Public corporations cannot be held personally liable under this statute.⁵ Neither can a personal liability under this statute be enforced against anybody else than the owner of the property improved by reason of his personal liability, with such owner, to the principal contractor for the cost of the improvements.^{5a}

§ 291. Personal liability under Indiana statute—Actions.—The liability against the owner is enforced by an ordinary action of money had and received. This action may be commenced at any time after the service of notice is given, and

² *Gilman v. Gard*, 29 Ind. 291; *O'Halloran v. Leachey*, 39 Ind. 150; *Crawfordsville v. Irwin*, 46 Ind. 438.

³ *Kulp v. Chamberlain*, 4 Ind. App. 560, 31 N. E. 376.

⁴ *School Town v. Gebhardt*, 61 Ind. 187.

⁵ *Jeffries v. Myers*, 9 Ind. App. 563, 37 N. E. 301.

^{5a} *Crawford v. Powell*, 101 Ind. 421; *School Town v. Gebhart* 61 Ind. 187.

the money is due, under the contract of the owner with the contractor. No one but the owner of the building can be made liable under this statute.^{1a} And the items for different buildings must be kept separate, so that the amount can be distinguished as to its place of service, especially where the same is put upon different buildings.² The limitation of the statute relating to liens on property, that the action be commenced in one year, does not apply to this section.³ Courts have held, that the complaint or petition under this section, need not contain a copy of the notice served on such owner.⁴ And furthermore that it need not be shown in the complaint that the parties have a right to enforce a lien.⁵ However, the pursuit of the remedy provided by this statute does not prevent the subcontractor from taking a lien on the building.⁶ And the complaint might be sufficient to enforce a personal liability that would not be sufficient to enforce the lien.⁷ The amount of recovery by a subcontractor or laborer must be determined by reference to the contract between the owner and the principal contractor, and the statement of their respective accounts at and after the time the notice was served.^{7a} If the plaintiff is entitled to the foreclosure of his lien, and the judgment rendered is erroneously made to include a personal judgment, the only remedy of the owner is by a motion to modify such judgment.^{7b} If a complaint to foreclose a mechanic's lien is brought against the owner and the contractor alleges a personal liability in general terms of judgment in favor of such

^{1a} Crawford v. Powell, 101 Ind. 421.

² Crawford v. Powell, 101 Ind. 421.

³ School Town v. Gebhardt, 61 Ind. 187.

⁴ Irwin v. Crawfordsville, 58 Ind. 492; School Town v. Gebhardt, 61 Ind. 187; Adamson v. Shaner, 3 Ind. App. 448, 29 N. E. 944.

⁵ Clark v. Maxwell, 12 Ind. App. 199, 40 N. E. 274.

⁶ O'Halloran v. Leachey, 39 Ind. 150; Crawford v. Crockett, 55 Ind. 220.

⁷ Clark v. Maxwell, 12 Ind. App. 199, 40 N. E. 274.

^{7a} Roberts v. Koss, 32 Ind. App. 510, 70 N. E. 185.

^{7b} Home B. Co. v. Johnson, 41 Ind. App. 44, 83 N. E. 358.

owner in that action will bar a second suit to enforce a personal liability against him on another ground inconsistent therewith.^{7c}

§ 292. **Personal judgment—Miscellaneous matters.**—It is error to render a personal judgment against a person not liable for the demand, merely because he is in possession and claiming title.¹ If there is a legal lien against the property, the purchaser or other lienor may pay the debt to save his property, and might in some cases be subrogated to the rights of a person for whom he pays the debt, but he is not otherwise obliged to pay the debt itself.² A personal judgment cannot be rendered unless there is a privity of contract between the person claiming the judgment and the person against whom it is claimed.³ If it is claimed by reason of a contract with an agent it must be shown to have been within the scope of the agent's authority.⁴ Even if the statute makes the owner directly responsible, this privity of contract is presumed from the law. But under such statutes no personal judgment can be rendered against the owner. The claimant must look to the property.^{4a} If the original contract is invalid,

^{7c} *United, etc. Co. v. Alberson*—Ind. App.—88 N. E. May 12, 1909.

¹ *Loring v. Flora*, 24 Ark. 151.

² *Work v. Hall*, 79 Ill. 196; *Quimby v. Sloan*, 2 E. D. Smith (N. Y.) 594, 2 Abb. Pr. (N. Y.) 93; *Mentzer v. Peters*, 6 Wash. 540, 33 Pac. 1078; *McGrew v. McCarty*, 78 Ind. 496.

³ *Alabama*—*May, &c. Hardware Co. v. McConnell*, 102 Ala. 577, 14 So. 768.

California—*Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336.

Illinois—*Bonney v. Ketcham*, 51 Ill. App. 321.

Indiana—*McDaniel v. Weaver*,

14 Ind. 517; *Farrell v. LaFayette Lumber & Mfg. Co.*, 12 Ind. App. 326, 40 N. E. 25.

Kansas—*Hodgson v. Billson*, 12 Kan. 568.

Missouri—*Schmeling v. Ewing*, 57 Mo. 78; *Walkenhorst v. Coste*, 33 Mo. 401.

Montana—*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303.

New York—*Cox v. Broderick*, 4 E. D. Smith (N. Y.) 721.

Texas—*Waldorff v. Scott*, 46 Tex. 1.

⁴ *Willverding v. Offneer*, 87 Iowa 475, 54 N. W. 592.

^{4a} *Merced Lumber Co. v. Bruch*, 152 Cal. 372, 92 Pac. 844.

no personal judgment can be rendered.⁵ Whether or not a personal judgment can be rendered against the principal contractor in an action brought by a subcontractor, will depend upon the facts and the pleadings, but it is not necessary where a principal contractor is liable to a subcontractor, to wait until there is a decree of foreclosure before a personal judgment can be rendered.⁶ Neither is it necessary that there should be a personal judgment before there can be a foreclosure of a lien.⁷ Where a court has proper jurisdiction, a personal judgment against a contractor cannot be attacked collaterally.⁸ Upon the question whether or not the court in the same action may render a personal judgment against the contractor, the same distinction rests as against the owner in this, that some courts hold that no such judgment can be rendered unless the facts are sufficient to establish the right to a lien.⁹ A personal judgment is not usually permitted where service of process is had by publication.¹⁰ If the subcontractor has dealt in such a way that credit was given to both con-

⁵ *Ponti v. Eckels*, 129 Wis. 26, 108 N. W. 62; *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45.

⁶ *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

Sufficient allegation to discharge.—Where a complaint to foreclose a mechanic's lien contains all the allegations necessary to authorize a personal judgment against the defendant sureties on a bond given to discharge the lien, and asks for judgment according to the law of the case and for further relief, the defendants are sufficiently apprised that a personal judgment is to be demanded. *Mathiasen v. Shannon*, 25 Misc. (N. Y.) 274, 54 N. Y. Supp. 305.

⁷ "Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position." *Russ Lumber & Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747.

⁸ *Glen Cove Granite Co. v. Costello*, 65 App. Div. (N. Y.) 43, 72 N. Y. Supp. 531.

⁹ *Cahill v. McCornish*, 74 Mo. App. 609; *Nussberger v. Wasserman*, 40 Misc. (N. Y.) 120, 81 N. Y. Supp. 295; *Mathiasen v. Shannon*, 25 Misc. (N. Y.) 274, 54 N. Y. Supp. 305.

¹⁰ *Bombeck v. Devorss*, 19 Mo. App. 38.

tractor and owner, a personal judgment may be rendered against both.¹¹ Under some statutes the party complaining is required to enforce a liability against the contractor in an action brought on the lien, before a personal judgment can be had, but under others this seems to be optional.¹² If the property is of such character that no lien right can be enforced, the subcontractor may be barred of his action.¹³

§ 293. Proceeds of sale.—The proceeds of the sale of the premises sold on foreclosure of a mechanic's lien, are distributed according to the order of the court. As a general rule, the first item to be paid is the costs and expenses of the litigation.¹ Second, the liens in the order of their priority as found by the court.² Third, after the lien claimants have been paid, the remainder should be applied to the payment of other claims upon the property that are found to be prior in right to the owners.³ Where a sale is made and confirmed and the

¹¹Hubbell v. Schreyer, 56 N. Y. 604, 15 Abb. Pr. (N. Y.) 300. In a proceeding by a subcontractor to enforce a mechanic's lien under the mechanic's lien law (23 Stat. 65) a personal judgment against the owner of the property as well as the original contractor, is proper, where, during the progress of the building, the contractor failed and abandoned the work, and where the record shows an unexpended balance of the contract price remaining in the owner's hands more than sufficient to pay the claim of the subcontractor. Emack v. Rushenberger, 8 App. Cas. (D. C.) 249. Cannot exceed amount due at time notice is given. Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681.

¹²Hill v. Chowning, 93 Mo. App. 620, 67 S. W. 750; Clapper v. Strong, 41 Misc. (N. Y.) 184, 83 N. Y. Supp. 935.

¹³The right given to a subcontractor by lien law, § 37, to recover a personal judgment against the original contractor and the owner of the building, is dependent on a lien at some time having attached; hence such a suit will not lie against school directors and a contractor for labor and material furnished for the erection of a school house. Quinn v. Allen, 85 Ill. 39.

¹See Fees and Costs, §§ 299-302. See Dec. & Am. Dig. tit Mechanics' Lien § 308.

²See Sections 144-164, where rights of priority are discussed.

³In re McFarland's Estate, 16 Pa. Super. Ct. 142.

purchaser fails to pay the purchase money, the execution officer may recover the same in an action in his own name.⁴ And if the sheriff should wrongfully pay out money, the creditors may sue to recover it back in the sheriff's name.⁵ The manner of distribution is that set out in the decree.⁶ The mere fact that the execution is so worn as not to show what the order was, will not affect its validity,⁷ and extraneous evidence may be heard to prove its contents.⁸ Matters of priority should be determined before the decree is entered and where this is done the decree can not be thereafter attacked unless for special cause shown.⁹ There can be no legal distribution except in the order of priority allowed by law and found by the court.¹⁰ A person entitled to priority may assign such

⁴ Trustees', Executors', &c., Ins. Co. v. Bowling, 2 Kan. App. 770, 44 Pac. 42.

⁵ Buchter v. Dew, 39 Ill. 40.

⁶ Sicardi v. Keystone Oil Co., 149 Pa. St. 139, 24 Atl. 161, 163. The term "distribution" as employed in Mechanic's lien Act, l, as amended by Laws 1893, Michigan, Act. No. 199, providing that the owner of a building is not to be protected in payment to the contractor unless the same is distributed to the subcontractors, etc., means a prorating to all entitled to take, and not a payment to one of the entire contract price. Fairbairn v. Moody, 16 Mich. 61, 74 N. W. 386, 75 N. W. 469. See § 274.

⁷ Yarborough v. Lumpkin, 52 Ga. 280.

⁸ Yarborough v. Lumpkin, 52 Ga. 280. In re Hill's Estate, 2 Clark (Pa.) 96, 3 Pa. L. J. 323.

⁹ Yarborough v. Lumpkin, 52 Ga. 280; Lauman's Appeal, 8 Pa.

St. 473; Wrigley v. Mahaffey, 5 Pa. Dist. 389.

¹⁰ State v. Drew, 43 Mo. App. 362.

In a contest between mechanics and others for a fund in court, a judgment recovered by the mechanic upon a sci. fa. is as to the other claimants, *res inter alios acta*, and not even *prima facie* evidence. As a judgment it ranks merely from its date. To come in as a lien, it must be proved so as to entitle it to relate to the commencement of the building. If such judgments are even *prima facie* evidence, honest mechanics might be defrauded with the greatest ease by the owners, when they became involved, confessing judgments or allowing them to be entered against them, and it would be utterly impossible for strangers to controvert them. Smedley v. Conaway, 5 Clark (Pa.) 417; McKim v. Mason, 3 Md. Ch. 186.

right and be preceded by the claimant to whom he assigns.¹¹ As a general rule, prior incumbrancers of the land are entitled to priority of payment out of the entire proceeds,¹² but where the mechanic's lien is allowed on the building separate from the land, questions as to the proper apportionment of the proceeds of the sale of the land and building are sure to arise,¹³ and in such cases, the court must determine what is to be applied to each.¹⁴ The general rule is that the prior incumbrancer takes such share of the proceeds as the value before the improvements were put on, bears to the total value after the improvements have been made.¹⁵

§ 294. **Proceeds of sale—Surplus.**—In the hearing for an order of distribution of surplus, all claims whether legal or equitable should be considered,¹⁶ and the same adjudged to the person entitled thereto.¹⁷ An order directing the surplus to be paid

¹¹ *Chauncey v. Dyke Bros.*, 119 Fed. 1, 55 C. C. A. 579.

¹² See § 151 et seq.

¹³ Priority, see § 164.

¹⁴ *Howett v. Selby*, 54 Ill. 151; *Raymond v. Ewing*, 26 Ill. 329; *North Presbyterian Church v. Jevne*, 32 Ill. 314, 83 Am. Dec. 261. Acts Ark. 1895, p. 217, § 3, provides that a mechanic's lien shall attach to the buildings in preference to any prior incumbrances existing on the land; provided, however, that, where the prior incumbrance was executed to raise money with which to make such improvements, then the lien should be prior to the lien given by the act. Section 10 provides that contractors for the erection of improvements must, on request, furnish to a mortgagee a full list of the claims of those laboring on an improvement or

furnishing materials therefor. A mortgage was executed for the purpose of securing money for improvements, but only a portion thereof went to pay for labor or material, the balance being turned over to the mortgagor who diverted it from such purpose. On a distribution of the proceeds of the property, the value of the land on which the mortgage was an undoubted prior lien, should be applied pro rata to the payment of both portions of the mortgage. *Chauncey v. Dyke Bros.*, 119 Fed. 1, 55 C. C. A. 579.

¹⁵ *Bradley v. Simpson*, 93 Ill. 93. *Whitenack v. Noe*, 11 N. J. Eq. 413. Where the material was put on while in possession of vendee, the lien was prior to vendor's lien. *Andry v. Guvol*, 13 La. (O. S.) 8.

to one not an owner of the premises is erroneous.¹⁸ Where the action is by a subcontractor, the principal contractor is entitled to that part of the surplus which will remain within the contract price.¹⁹

§ 295. **Appeal and error.**—The question whether proceedings of a lower court may be reviewed by some higher court, and the manner of such review, are controlled by the procedure and laws of the state in which the action is pending, and it will be necessary for the inquirer carefully to scrutinize the laws of the state in reference to such matters, as appellate courts generally construe the right of appeal strictly and require a strict performance of the conditions laid down by the statute granting the right. In matters relating to mechanics'

Rent paid out of proceeds.—A lease stipulated that at the end of the term the lessee might remove his improvements, provided the same should, if removed, be subject to distraint for the rent in like manner as personal property and as if still on the premises. The lessee erected a building thereon for which mechanics' liens were filed, and under which the leasehold was sold and the buildings removed by the sheriff's endee. The lessor was entitled to have his rent paid out of the proceeds of the sale. *Schenley's appeal*, 70 Pa. St. 98.

¹⁶ *Cromble v. Rosentock*, 190 N. Y. Cas. (N. Y.) 312.

¹⁷ *The Ohio Sav. & Loan Co. v. Johnson*, 20 Ohio C. Ct. 96; *Tramell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479. Pending dispute between the owners of premises and the holders of mechanics' liens thereon as to

whether or not certain machines were fixtures and subject to the lien, the premises, including the machinery, were sold under a mortgage to which they were subject, and a surplus was left over. On deciding that they were not fixtures, and not, therefore, subject to the lien, that the owners of the premises were not entitled to receive out of the surplus the full value of the machines at the time they were sold, regardless of whether or not the premises sold for full value, but should receive an equitable proportion with regard to the depreciation of the whole property in the sale. *Case v. Arnett*, 26 N. J. Eq. 459.

¹⁸ *Woodburn v. Gifford*, 66 Ill. 285.

¹⁹ *Flaherty v. Atlantic Lumber Co.*, 58 N. J. Eq. 467, 44 Atl. 186. Where an undivided moiety of real estate (held under articles of

liens and proceedings to recover moneys due a material man or contractor, the right to review in the form of appeal and error generally exists,¹ yet it does so, it may be repeated, only by some statutory provision to that effect, and in the absence of a statute granting such right, the parties are bound by the decision of the original court.² In some states, the question whether the case can be brought in review in an appellate court by appeal or by error, depends upon the fact whether the action is regarded as one at common law or in equity.³

agreement and to be paid for in installments) was contracted for by one who paid a portion of the purchase money, but was prevented from paying the balance and receiving his title by a judicial sale of the whole property under mechanics' liens which were on it at the time of the contract, on distribution of the proceeds of sale it was held that the contract and payment by the purchaser of the undivided moiety made him an owner in equity to the extent of the money paid, and that the sheriff's sale converted the interests of both owners into money, substituting an ownership of money, instead of land. *Barnes's Appeal*, 46 Pa. St. 350.

Purchaser of Premises.—Defendant entered into a verbal contract for the purchase of land, paying part of the purchase price in cash, the balance to be paid in 90 days. Before the expiration of the 90 days he erected a dwelling house on the land. He failed to pay the balance of the purchase money. In an action to foreclose mechanics' liens on the

property it was held that the property would be sold as upon execution, and the proceeds applied; first, to the payment of the amount due on the contract of purchase, with legal interest; and, second, to the payment of the liens on said property, the remainder, if any, to the purchaser, but in case there was not sufficient after paying the purchase price to satisfy the liens, then the lienholders would be paid pro rata. *Irish v. Lundin*, 28 Neb. 84, 44 N. W. 80.

¹ *Dickson v. Corbett*, 10 Nev. 439; *French v. Bauer*, 11 N. Y. Supp. 703, 34 N. Y. St. 15; *McAllister v. Case*, 7 N. Y. Supp. 600, 27 N. Y. St. 813; *Knowlton v. Smith*, 163 Ind. 294, 71 N. E. 895.

² *Clark v. Raymond*, 26 Mich. 415; *American Brick & Tile Co. v. Drinkhouse*, 59 N. J. L. 462, 36 Atl. 1034; *Dunn v. Kanmacker*, 26 Ohio St. 497; *O'Connell v. Smith*, 101 Wis. 68, 76 N. W. 1116.

³ *Dickson v. Corbett*, 10 Nev. 439; *Idaho, &c. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. 177.

If the proceeding is at common law, and was tried by a jury, then it can only be taken up on error. If it is equitable and tried by the court, then by appeal.² On appeal, the case is heard anew, but on error, only upon the evidence and law as preserved in a bill of exceptions from the court below. Either method, however, involves a careful consideration and a close following of the statute granting the right. No general rules can otherwise be given as the statutes of no two states are alike. Where the matter lies in the discretion of the lower court, it is a general principle that a finding of that court will not be disturbed on review or appeal, unless an abuse of this discretion is shown.³ While a higher court can not increase the amount allowed below, yet it is the practice of that court sometimes to require a remittitur, decreasing the amount and affirming the decision for the lower amount.⁴

§ 296. Methods of preserving questions for review—Notice.—

As a general rule, where the court has jurisdiction, the question of the sufficiency of the petition must be raised in the court below.¹ If it is claimed that some of the items are

² **Kansas.**—*Prairie Lumber Co. v. Korsmeyer* (Kan.) 43 Pac. 773.

Missouri.—*Blunt v. Sheppard*, Mo. 219.

Pennsylvania.—*Keemer v. Herr, Penny* (Pa.) 175, 12 W. N. C. (Pa.) 90; *Carter v. Caldwell*, 147 Pa. St. 370, 23 Atl. 575.

Virginia.—*Hendricks v. Fields, Gratt.* (Va.) 447.

³ *O'Brien v. Sylvester*, 12 Pa. per. Ct. 408.

⁴ *Allen v. Elwert*, 29 Ore. 428, Pac. 823, 48 Pac. 54.

California.—*Coss v. MacDonogh*, 111 Cal. 662, 44 Pac. 325; *ss Lumber, &c. Co. v. Garrett*, 87 Cal. 589, 25 Pac. 747.

Illinois.—*Brown v. Lowell*, 79 Ill. 484.

Indiana.—*Lengelsen v. McGregor*, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248.

Oklahoma.—*El Reno Electric Light, &c. Co. v. Jennison*, 5 Okla. 759, 50 Pac. 144. In an action to foreclose a mechanic's lien which was discharged by giving bond, an objection that the complaint was defective in failing to allege an assignment of a bond by the county clerk, or that any leave to sue on the bond, or that the sureties were approved, cannot be raised for the first time on appeal. *D'Andre v. Zimmermann*, 17 Misc. (N. Y.) 357, 39 N. Y.

non-lienable,² or that the material was not used in the building,³ or that there is a non-joinder of parties,⁴ or that the notice for the lien is insufficient,⁵ or that the ownership of property is not shown,⁶ or that the notice is improperly verified,⁷ or that the affidavit is improper,⁸ or that the complaint was tried by a court at law, when it should have been in a court of equity,⁹ or that the proof fails to show the existence of the lien,¹⁰ or that the contract was invalid,¹¹ or that the

Supp. 1086. An objection to a recovery in an action to enforce a statutory mechanic's lien, that the land involved, comprising a part of two city lots, was not proved not to exceed one acre in area, is not available on appeal, if not raised in the trial court. *Egan v. Menard*, 32 Minn. 273, 20 N. W. 197. In an action by a building contractor, defendant cannot for the first time on appeal complain that the plans and specifications referred to in the contract set out in the complaint, and introduced in evidence, were not attached to or made a part thereof, and hence that the contract was not in its entirety filed for record, as required by statute. *White v. Fresno Nat. Bank*, 98 Cal. 166, 32 Pac. 979.

² *Emerson v. Gainey*, 26 Fla. 133, 7 So. 526; *Schulenburg, &c., Lumber Co. v. Strimple*, 33 Mo. App. 154.

³ *Duignan v. Montana Club*, 16 Mont. 189, 40 Pac. 294.

⁴ *Duignan v. Montana Club*, 16 Mont. 189, 40 Pac. 294.

⁵ *Phoenix Iron Co. v. The Richmond*, 6 Mackey (D. C.) 180; *Ford v. Springer Land Assn.*, 8

N. Mex. 37, 41 Pac. 541. A party cannot present in the Supreme Court a matter of exception not presented in the court below. *Hause v. Carroll*, 37 Mo. 578.

⁶ *Dixon v. La Farge*, 1 E. D. Smith (N. Y.) 722.

⁷ *Moore v. McLaughlin*, 66 Hun (N. Y.) 133, 21 N. Y. Supp. 55; *Boyd v. Bassett*, 16 N. Y. Supp. 10, 61 Hun (N. Y.) 624 (without opinion).

⁸ *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821.

⁹ *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109.

¹⁰ *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Mowbray v. Levy*, 85 App. Div. (N. Y.) 68, 82 N. Y. Supp. 959.

Has personal security.—After judgment foreclosing a mechanic's lien claimed under Code, § 1979, defendant cannot object that plaintiff failed to allege and prove that he had taken no personal security for his debt. *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512.

¹¹ *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095.

material was not furnished within the time limit—these are questions that must be raised in the lower court, or they will not afterwards be considered.¹² However, if the lower court has no jurisdiction of the subject matter, this question may be raised at any time.¹³ The various statutes mark out the method to be pursued to transfer a cause from one court to another and that must be strictly followed.¹⁴ The judgment will not be stayed unless bond is given as the statute provides.¹⁵ Where the nature of the law and the rights of the parties are such that the rights of all must be construed, in order to determine the rights of those appealing, the court will consider the rights of all, although all are not appealing from the decision of the lower court.¹⁶ All persons who are parties and would be affected by the order of the appellate court, are entitled to notice or service of appeal or error.¹⁷

¹² *Hess v. Peck*, 111 Ill. App. 111.

¹³ *United States Mortgage & Trust Co. v. Wood*, 19 Ohio C. C. 58, 10 Ohio Cir. Dec. 324.

¹⁴ *Sweet v. James*, 2 R. I. 270.

Appeal to U. S. Court.—On an appeal from a territorial court to the United States Supreme Court in an action to enforce a mechanic's lien, the bond, to act as supersedeas, should be executed by the appellees, conditioned to prosecute the appeal to effect or answerable in damages, and could provide for an amount to cure the liens recovered, the costs of suit, just damages for lay and detention of the property, and costs and interest on appeal. *Mason v. Germaine*, 1 Ont. 279.

¹⁵ *Central Lumber, &c. Co. v. Hunter*, 107 Cal. 193, 40 Pac. 334; *Lien Gaslight Co. v. Hurley*, 11

Iowa 520; *State v. Super. Ct. of Snohomish County*, 11 Wash. 366, 39 Pac. 644.

¹⁶ *Gray v. Havemeyer*, 53 Fed. 174, 3 C. C. A. 497, 10 U. S. App. 456.

¹⁷ *Cotes v. Carroll*, 28 How. Pr. (N. Y.) 436; *Hiscock v. Phelps*, 2 Lans. (N. Y.) 106. Executors adverse. *Barnhart v. Edwards*, 111 Cal. 428, 44 Pac. 160. But unless adversely affected, notice need not be given. *Green v. Berge*, 105 Cal. 52, 38 Pac. 539, 45 Am. St. 25. Defendant contractor. *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951, 37 Pac. 207. Owner of undivided interest. *De Arnaz v. Jaynes* (Cal.) 34 Pac. 223. Grantor of premises. *Chase v. Christenson*, 92 Iowa, 405, 60 N. W. 640.

Who are adverse.—The adverse party, on whom a notice of appeal is served, is the party

§ 297. **Proceedings and record—Appeal or error.**—The record must be made up in the manner prescribed by the statute relating to appeals and errors, and unless so done the higher court will not consider the case.¹ A party who is not affected prejudicially by the order is not entitled to allege errors.³ If the contractor should fail to recover on his lien, having yet

whether plaintiff or defendant, whose interests in the question sought to be raised on the appeal are adverse to appellant's. *Frost v. St. Paul Banking & Inv. Co.*, 57 Minn. 325, 59 N. W. 308. Executors adverse. *Cotes v. Smith*, 31 How. Pr. (N. Y.) 146. Intervenor. *Gray's Harbor Commercial Co. v. Wotten*, 14 Wash. 87, 43 Pac. 1095. Joint makers of a mortgage, against whom both a personal judgment and one of foreclosure were entered jointly, are adverse parties and notice of appeal by one must be served on the other. *Jones v. Quantrell*, 2 Idaho 141, 9 Pac. 418.

¹ *Colorado*.—*Clear Creek Gold & Silver Min. Co. v. Root*, 1 Colo. 374.

Illinois.—*Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115; *Ross v. Derr*, 18 Ill. 245; *Bonnell v. Lewis*, 3 Ill. App. 283.

Michigan.—*Roberts v. Miller*, 31 Mich. 73.

³ *Illinois*.—*Martin v. Swift*, 120 Ill. 488, 12 N. E. 201.

Indiana.—*Vigo Real Estate Co. v. Reese*, 21 Ind. App. 20, 51 N. E. 350; *Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675.

Minnesota.—*Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

Texas.—*Red River County Bank v. Higgins*, 72 Tex. 66, 9 S. W. 745.

Contractor on public buildings.—In an action by a subcontractor for the erection of a county court house against the contractor, in which the county is joined as a party defendant, and a lien on the court house is sought to be established, if the county suffers default, and a decree is entered foreclosing the lien, it will not prejudice the rights of the contractor, and will not be available on his writ of error from a judgment against him also. *Loonie v. Burt*, 80 Tex. 582, 16 S. W. 439.

Not prejudicial.—Where plaintiff fails to prove every other fact necessary to establish his right to a mechanic's lien, the exclusion of a lien paper presented by him is not prejudicial. *O'Shea v. O'Shea*, 91 Mo. App. 221.

Party in default.—A party against whom a petition in a proceeding to enforce a mechanic's lien has prayed a discovery of his and another defendant's respective interests, but both of whom have failed to answer and been defaulted, cannot complain. *Gould v. Garrison*, 48 Ill. 258.

Does not show relation.—A decree against the owner will not

the right to recover personally, he would be interested and entitled to appeal.⁴ But unless the record contains all of the evidence, the reviewing court will not set aside the finding because of insufficiency.⁵ Error will not lie to rulings on questions that are immaterial⁶ or not in issue.⁷ However, if in determining the rights of others, it is necessary to determine the right of the claimant, his rights would be determined necessarily with the rights of others.⁸ But a contractor cannot be said to be affected by a judgment affecting merely the premises, no personal judgment having been rendered,⁹ nor complain of errors,¹⁰ affecting only others,¹¹ or those he has waived.¹² And when he does not appeal he cannot on the appeal of the property owner raise new questions.¹³

§ 298. **Error and appeal—Miscellaneous.**—Error will not be presumed, it must be shown,¹ and on error or appeal, it is presumed that the proceedings in the court below were regular and according to law, and that sufficient evidence had been given to sustain the decree.² Just what questions a review-

be reversed for failure to serve certain defendants, where it does not appear what relation they sustained to the subject-matter of the suit. *Branham v. Nye*, 9 Colo. App. 19, 47 Pac. 402.

⁴ *Murdock v. Jones*, 3 App. Div. (N. Y.) 221, 38 N. Y. Supp. 461; *Kruger v. Braender*, 3 Misc. (N. Y.) 375, 23 N. Y. Supp. 324.

⁵ *Lonkey v. Wells*, 16 Nev. 271.

⁶ *Morse-Williams & Co. v. Ellis*, 172 Mass. 378, 52 N. E. 540.

⁷ *Zarrs v. Keck*, 40 Neb. 456, 58 N. W. 933.

⁸ *Downey v. O'Donnell*, 92 Ill. 559; *Lepin v. Paine*, 18 Neb. 629, 26 N. W. 370; *Lookout Lumber Co. v. Sanford*, 112 N. Car. 655, 16

S. E. 849; *Price v. Sanford*, 112 N. Car. 660, 16 S. E. 850.

⁹ *Hartman v. Sharp*, 51 Mo. 29; *Kruger v. Braender*, 3 Misc. (N. Y.) 275, 23 N. Y. Supp. 324.

¹⁰ *Hendricks v. Fields*, 26 Gratt. (Va.) 447.

¹¹ *Clarkson v. Louderback*, 36 Fla. 660, 19 So. 887.

¹² *Sharpe v. Spengler*, 48 Miss. 360.

¹³ *Hall v. New York*, 79 N. Y. Supp. 979, 79 App. Div. (N. Y.) 102; *Morgan v. Taylor*, 15 Daly (N. Y.) 304, 5 N. Y. Supp. 920.

¹ *Richardson v. Warwick*, 7 How. (Miss.) 131.

² *Johnson v. Otto*, 105 Iowa 605, 75 N. W. 492; *Cole v. Custer*

ing court will consider, will of course depend upon the law of the forum, and where questions of fact will not be reviewed,³ the determination of what is a question of fact,⁴ becomes material. A conclusion of law is not a finding of fact.⁵ If the evidence is ample,⁶ or is conflicting the decision of the lower court will be sustained.⁷ So likewise, if the error is harmless.⁸ Under the procedure in some jurisdictions when the appellate court finds that there has been some error, the error will be corrected and judgment rendered accordingly.⁹ In other

County Agricultural, &c. Assn., 3 S. Dak. 272, 52 N. W. 1086.

³ *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367.

⁴ *Gannon v. Shepard*, 156 Mass. 355, 31 N. E. 296.

⁵ *Pierce v. Willis*, 103 Cal. 91, 36 Pac. 1080.

Mixed Questions.—Whether a furnace and cistern were furnished for erecting, altering, or repairing a house, so that a lien attaches for the price, is a mixed question of law and fact; and therefore a referee's decision thereon will not ordinarily be disturbed, unless he misapplied the law. *Kent v. Brown*, 59 N. H. 236.

⁶ *Howell v. Wise*, 28 Neb. 756, 44 N. W. 1139.

⁷ *Willard v. Magoon*, 30 Mich. 273; *Lutz v. Ely*, 3 E. D. Smith (N. Y.) 621, 3 Abb. Pr. (N. Y.) 475; *Dunbar v. Washington Foundry & Mach. Co.*, 210 Pa. St. 58, 59 Atl. 434.

⁸ *Murphy v. Valk*, 30 S. Car. 262; 9 S. E. 101; *McConnell v. Worns*, 102 Ala. 587, 14 So. 849.

Instances.—The judgment in a mechanic's lien case directed sale

of the premises, instead of the right, title, and interest of the defendant therein. Was harmless. *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39. *Elliott, Supp.* § 1691 (Acts 1883, p. 141), requires the recorder to record the notice of lien in the "Miscellaneous Record," but it was entered in what was called the "Mechanic's Lien Record." It was erroneous to admit in evidence this entry, as no "mechanic's lien record" was authorized by law, but that the error was harmless, since the lien was acquired by filing the notice, and not by its record. *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108. In a suit by certain subcontractors, the court's refusal to permit the owner to show how much he had paid other subcontractors was not material error, where it was not shown that the whole amount would be more than the contract price. *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230.

⁹ A judgment erroneously gave a subcontractor a mechanic's lien on more than one acre of land used in connection with the build-

jurisdictions the proper procedure is to remand the cause back for a new trial.¹⁰ In other cases, where the remand would be futile, the action will be finally dismissed.¹¹ Where a case is appealed and judgment is vacated, such vacation acts upon all the parties against whom it was rendered, especially if they were jointly interested.¹²

§ 299. **Costs.**—It is a general rule, that the costs are entitled to be paid out of the proceeds arising from the sale of the premises,¹ and under some statutes, this will include the

ings erected thereon. On the trial it was proved without dispute that the principal building, considerably exceeding all the others in cost and value was located on the west one acre of the entire tract. The court, on appeal, would correct the judgment, and limit the lien to the west one acre. *Dusick v. Melselbach*, 118 Wis. 240, 95 N. W. 144.

¹⁰ *Crawford v. O'Connor*, 73 N. Y. 600; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) (N. Y.) 59; *Sullivan v. Johns*, 5 Whart. (Pa.) 366; *Brewer v. Hugg*, 114 Iowa 486, 87 N. W. 409.

¹¹ Where it appeared on appeal from a judgment foreclosing a mechanic's lien against community property that service was had on the wife, but not upon the husband, and the eight months allowed by Ballinger's Ann. Codes & St. 5908, for bringing suit on such lien had expired, the action should be dismissed; since, the statutory limitation having expired, no new action could be brought upon the claim, it being

necessary to commence the action against both of the community within the statutory period. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹² *Bruce Lumber Co. v. Hoos*, 67 Mo. App. 264.

¹Where prior incumbrancer is purchaser.—Where, in an action to foreclose a mechanic's lien, a mortgagee having a prior lien was summoned in as required by Gen. Laws, c. 206, § 10, and purchased the property at the master's sale for less than the mortgage debt, he is entitled to the proceeds of the sale, and should not be required to pay any of the costs of the proceeding, other than the expense of the sale, under section 13, providing that the costs shall be within the discretion of the court. *Jepherson v. Green*, 24 R. I. 83, 52 Atl. 808. The master's fees in a successful proceeding for a mechanic's lien are properly charged to the owner of the building. *Montonya v. Reilly*, 184 Ill. 183, 56 N. E. 425.

money paid for filing and recording the lien,² but not unless it is necessary so to do and the statute so provides.³ In some states, attorney fees for foreclosure of the suit are included.⁴ There is some conflict upon the question whether such statutes are valid.⁵ Where such fees are allowed, they

² *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144.

³ *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421. A master who incurs expenses by having drawn up a notice of sale, etc., before the time limited for the redemption of property has expired, does so at his own risk, and cannot recover back such expenses, if the mechanics' liens for which the sale was to be made are paid before the expiration of the time limited for redemption. *Neher v. Crawford*, 10 N. Mex. 725, 65 Pac. 156.

⁴ *Williams v. Gaston*, 127 Cal. 641, 60 Pac. 427; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Lee v. Kimball*, 45 Wash. 656, 88 Pac. 1121; *Davis v. Rittenhouse & Embree Co.*, 92 Ill. App. 341. Fixed by statute at 10 per cent. mandatory. *Kalina v. Steinmeyer*, 103 Ill. App. 502. Only allowed in trial court. *West v. Badger Lumber Co.*, 56 Kan. 287, 43 Pac. 239; *Murray v. Swanson*, 18 Mont. 533, 46 Pac. 441. When mechanics' liens are consolidated, all the claimants together constitute the "prevailing party" and but one attorney's fee can be taxed. *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300. Counsel fees actually paid are to

be included among the "actual disbursements," whether or not the counsel is a solicitor in the cause. *Robock v. Peters*, 13 Manitoba 124.

⁵ "While it is true there is some conflict of authority upon the validity of such a statute, we think the later authorities have one trend, and that is to maintain such a provision in statutes similar to our lien laws. Such provisions have been upheld by the courts of California with great unanimity, and the same rule obtains in Montana. *Hicks v. Murray*, 43 Cal. 515; *Quale v. Moon*, 48 Cal. 478; *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280." *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571. These extra costs imposed upon a defendant in this class of cases under our statute are allowed as a penalty for not paying his honest debts and to reimburse the plaintiff for the prosecution of his action. Statutes similar to our own providing for allowance of attorney's fees have been upheld in the following cases: *Genest v. Las Vegas Masonic Bldg. Assn.*, 11 N. Mex. 251, 67 Pac. 743; *Armijo v. Mountain Electric Co.*,

are usually fixed by the trial court.⁶ And where the record does not show them to be unreasonable they will be presumed to be proper in amount.⁷ It is generally held, however, that it is error to render judgment for attorney fees without evidence of the services performed and their value.⁸ A number of courts, however, have held that the attorney's fee being in the nature of a penalty cannot be collected as costs in the proceedings,⁹ and further that if allowed, they can only

11 N. Mex. 235, 67 Pac. 726; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Helena Steam Heating, &c. Supply Co. v. Wells, 16 Mont. 65, 40 Pac. 78; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Ivall v. Willis, 17 Wash. 645, 50 Pac. 467; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Dell v. Marvin, 41 Fla. 221, 26 So. 188, 79 Am. St. 171, 45 L. R. A. 201; Cameron v. Chicago, &c., R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; Perkins v. St. Louis, &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426n; Burlington, &c. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. 477, 12 L. R. A. 436n. Such attorney's fees seem to have been recognized and uniformly sustained in California. Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; McIntyre v. Trautner, 78 Cal. 449, 21 Pac. 15; Jewell v. McKay, 82 Cal. 144, 23 Pac. 139. See where declared unconstitutional. Robertson v. Moore, 10 Idaho 115, 77 Pac. 218. The later California decision seems to be against allowance. Donaldson v. Orchard Crude Oil Co. (Cal. App.) 92 Pac. 1046;

Pacific Lumber Co. v. Wilson (Cal. App.) 92 Pac. 654.

⁶ Hill v. Cassidy, 24 Mont. 108, 60 Pac. 811; Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081; Sweatt v. Hunt, 42 Wash. 96, 84 Pac. 1. Applicable to all liens, etc. Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280. The objection that the judgment on foreclosure of a mechanic's lien allowed attorney's fees, without any evidence of the value thereof cannot be sustained where the fees were stipulated to be reasonable at the trial. Greene v. Finnell, 22 Wash. 186, 60 Pac. 144.

⁷ Fitch v. Howitt, 32 Ore. 796, 52 Pac. 192.

⁸ Burleigh Bldg. Co. v. Merchant Brick and Bldg Co., 13 Colo. App. 455, 59 Pac. 83; Gunby v. Drew, 45 Fla. 350, 34 So. 305.

⁹ Sickman v. Wollett, 31 Colo. 58, 71 Pac. 1107. We desire, however, to give prominence to the idea that we regard it as a controlling and authoritative exposition by our highest national tribunal, which we ought to follow. Gulf, &c. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; Wilder v. Chicago, &c. R.

be allowed under the law in force at the time the contract was made, and not the law in force at the time of suit.¹⁰ Costs generally are taxed according to the law in force at the time of the taxing of costs.¹¹ The amount of the costs does not depend upon the averments of the complaint,¹² as they are either fixed by statute,¹³ or depend upon the findings of the court.¹⁹ The question of costs is not any part of the proceedings to enforce the lien and is not determined until the end is reached and then only as a sequence.²⁰ Generally if plaintiff is obliged to bring suit to secure his claim, he is entitled to his costs,²¹ but he must prevail, or he will not have such right.²²

§ 300. **Attorney's fees under the Indiana statute.**—The Indiana statute on the subject of attorney's fees in mechanic's lien

Co., 70 Mich. 382, 38 N. W. 289; Schut v. Chicago, &c., R. Co., 70 Mich. 433, 38 N. W. 291; Lafferty v. Chicago, &c. R. Co., 71 Mich. 35, 38 N. W. 660; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; Hocking Val. Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. 263, 53 Am. St. 622, 29 L. R. A. 386; State v. Fire Creek Coal, &c. Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. 891, 6 L. R. A. 359; South & North Alabama R. Co. v. Morris, 65 Ala. 193; Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350; Title Guarantee & Trust Co. v. Burdette, 104 Md. 666, 65 Atl. 341; Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 Pac. 262; O'Niel v. Taylor, 59 W. Va. 370, 53 S. E. 471.

¹⁰ It is in the nature of an additional incumbrance. Kendall v.

Fader, 199 Ill. 294, 65 N. E. 318.

¹¹ George v. Everhart, 57 Wis. 397, 15 N. W. 387.

¹² Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Armijo v. Mountain Electric Co., 11 N. Mex. 235, 67 Pac. 726.

¹³ Kalina v. Steinmeyer, 103 Ill. App. 502; Myer v. Gleisner, 7 Wis. 55.

¹⁹ Kipp v. Massin, 15 Ill. App. 300. Depending upon a trial. Randolph v. Foster, 3 E. D. Smith (N. Y.) 648, 4 Abb. Pr. (N. Y.) 262. Discretion of the court. Marryatt v. Riley, 2 Abb. N. Cas. (N. Y.) 119; Reynolds v. Hamil, 1 Code Rep. (N. S.) (N. Y.) 230.

²⁰ Fargo v. Hamlin, 5 N. Y. St. 297.

²¹ Linck v. Johnson, 66 Pac. 674, 134 Cal. xix (without opinion).

²² Hooper v. Fletcher, 145 Cal. 375, 79 Pac. 418; Hess v. Peck,

actions is as follows: In all suits brought for the enforcement of any lien under the provisions of this act, if the plaintiff or lien holder shall recover judgment in any sum, he shall also be entitled to recover reasonable attorney's fees, which shall be entered by the court trying the same, as a part of the judgment in said suit.²³ The constitutionality of this section has been sustained by the supreme court.²⁴ But there is no right to recover an attorney fee unless suit is brought and a judgment recovered by the plaintiff.²⁵ That notes have been executed for the debt secured by the lien does not affect the right to an attorney fee under this section.²⁶

§ 301. Costs—Attorney's fees—Miscellaneous.—Neither costs,¹ nor attorney's fees, as said in a previous section are allowed, unless the party prevails in the litigation.² The items of ordinary costs are fixed by statute, and the amount of attorney's fees is generally such as the court deems reasonable.³ Where the fee rests in the discretion of the trial court it will

111 Ill. App. 111; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129.

²³ *Burns' R. S.* 1908, § 8307.

²⁴ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

²⁵ *Bird v. St. John's Church*, 154 Ind. 138, 56 N. E. 129.

²⁶ *Beach v. Huntsman—Ind. App.* —, 83 N. E. 1033.

¹ *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438; *Los Angeles Gold Min. Co. v. Campbell*, 13 Colo. App. 1, 56 Pac. 246; *Dell v. Marvin*, 41 Fla. 221, 26 So. 188, 79 Am. St. 171n, 45 L. R. A. 201.

² *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860; *McIntyre v. Traut-*

ner, 78 Cal. 449, 21 Pac. 15. See §§ 299, 300.

³ *Stimson Mill Co. v. Riley* (Cal.) 42 Pac. 1072; *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1, 56 Pac. 246. The allowance, being for attorney's fees "in the superior and supreme courts," does not include the amount paid for preparing claim of lien. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144.

Amount of attorney fees.—In a consolidated action to foreclose mechanics' liens, attorney's fees of \$100 each, were allowed to two claimants who had separate attorneys, and who filed separate complaints, and were adjudged

not be disturbed on appeal unless that discretion is abused.⁴ The question of the right to allow fees may be raised in the appellate court.⁵ Where the litigation is only between contractor and owner,⁶ or if caused by the owner's fault, the costs should come out of the proceeds of the whole property.⁷ If the owner is a mere stakeholder, then the costs should be taxed against the parties interested, who are responsible for the litigation,⁸ or who should equitably bear the same.⁹

§ 302. **Costs—Owner under disability.**—Where the owner is under a disability, the costs caused by such disability should

\$293.23 and \$107.64 respectively. The other eight plaintiffs had other attorneys, and joined in a complaint on claims aggregating \$663.02, and were allowed \$100 attorney's fees, to be apportioned ratably according to their several judgments. The trial was of considerable length and some complexity. The allowance of attorney's fees was not excessive. *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479. The allowance of \$250 attorney's fees, in an action to foreclose 11 mechanics' liens, is reasonable. *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

⁴ *Title Guaranty, &c. Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454.

⁵ *McCarthy v. Havis*, 23 Fla. 508, 2 So. 819.

⁶ *Kenney v. Apgar*, 93 N. Y. 539; *Holler v. Apa*, 18 N. Y. Supp. 588, 47 N. Y. St. 485; *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356; *Close v. Hunt*, 8 Blackf. (Ind.) 254.

⁷ *De Camp Lumber Co. v. Tolhurst*, 99 Cal. 631, 34 Pac. 438. When one is not liable upon an issue of debt raised in a foreclosure of a mechanic's lien, but is a proper party to the suit on the question of the right of foreclosure, and the suit is decided against him on that issue, the costs may be adjudged against him as well as against the other defendant. *Lindsley v. Parks*, 17 Tex. Civ. App. 527, 43 S. W. 277.

⁸ *Eagleson v. Clark*, 2 E. D. Smith (N. Y.) 644.

⁹ *Indiana*.—*Manor v. Heffner*, 15 Ind. App. 299, 43 N. E. 1011.

Minnesota.—*Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

New York.—*Condon v. Church of St. Augustine*, 112 App. Div. (N. Y.) 168, 98 N. Y. Supp. 253; *Ottman v. Schenectady Co-Operative Realty Co.*, 119 App. Div. (N. Y.) 736, 104 N. Y. Supp. 137.

Pennsylvania.—*Miller v. Dffenbach*, 10 Lanc. Bar (Pa.) 144.

not be charged to the fund to the prejudice of a mechanic's lien.¹⁰

¹⁰ **Guardian for Drunkard.** — Where the estate of an habitual drunkard, who has no personal estate from which to pay the costs of the inquisition, is sold by order of the court, and a mechanic has a lien on the real es-

tate, the costs of the inquisition are not chargeable to the fund in prejudice of the lienholder, but all costs connected with the sale are properly paid therefrom. *Malone's Appeal*, 79 Pa. St. 481.

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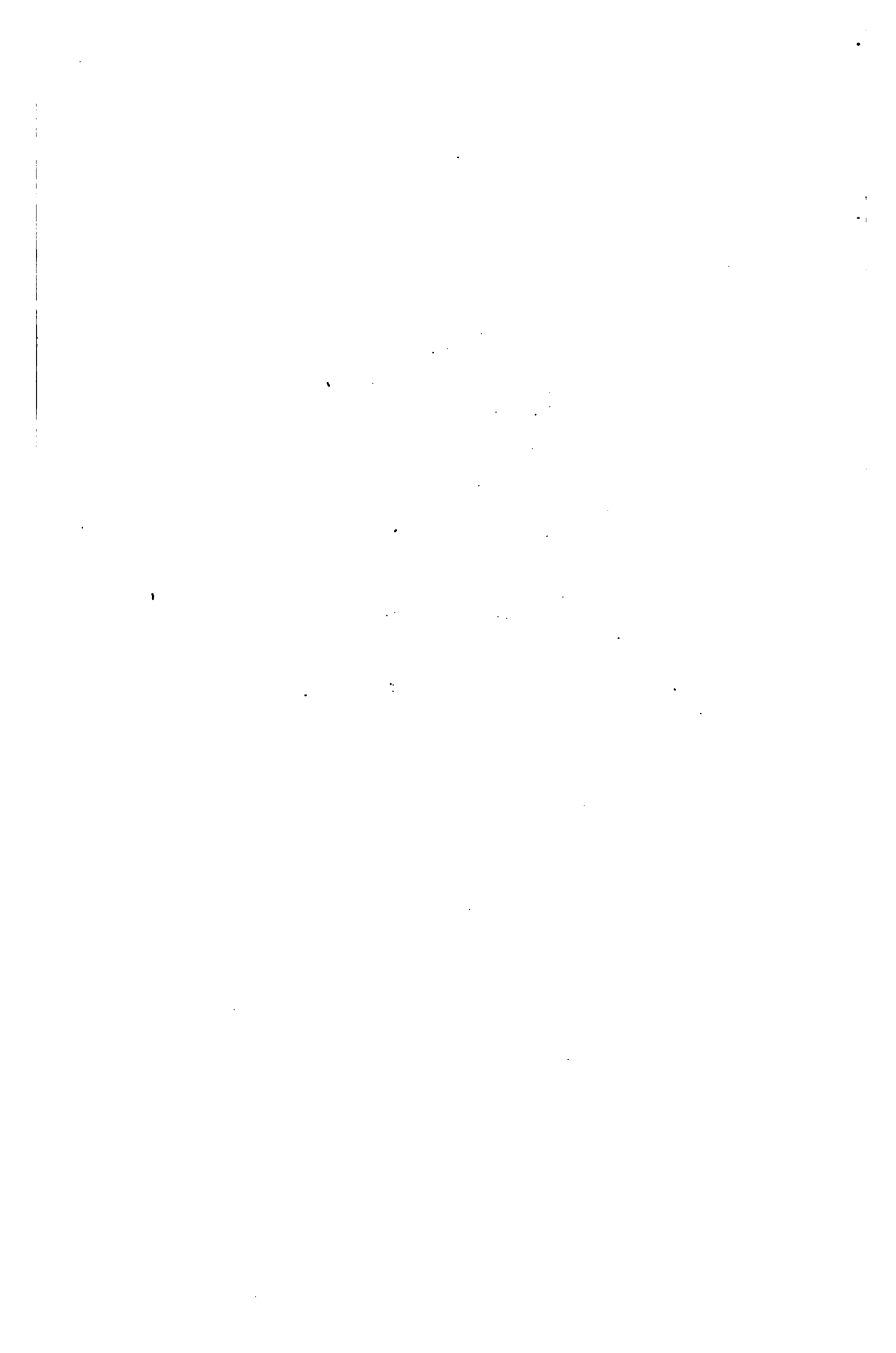
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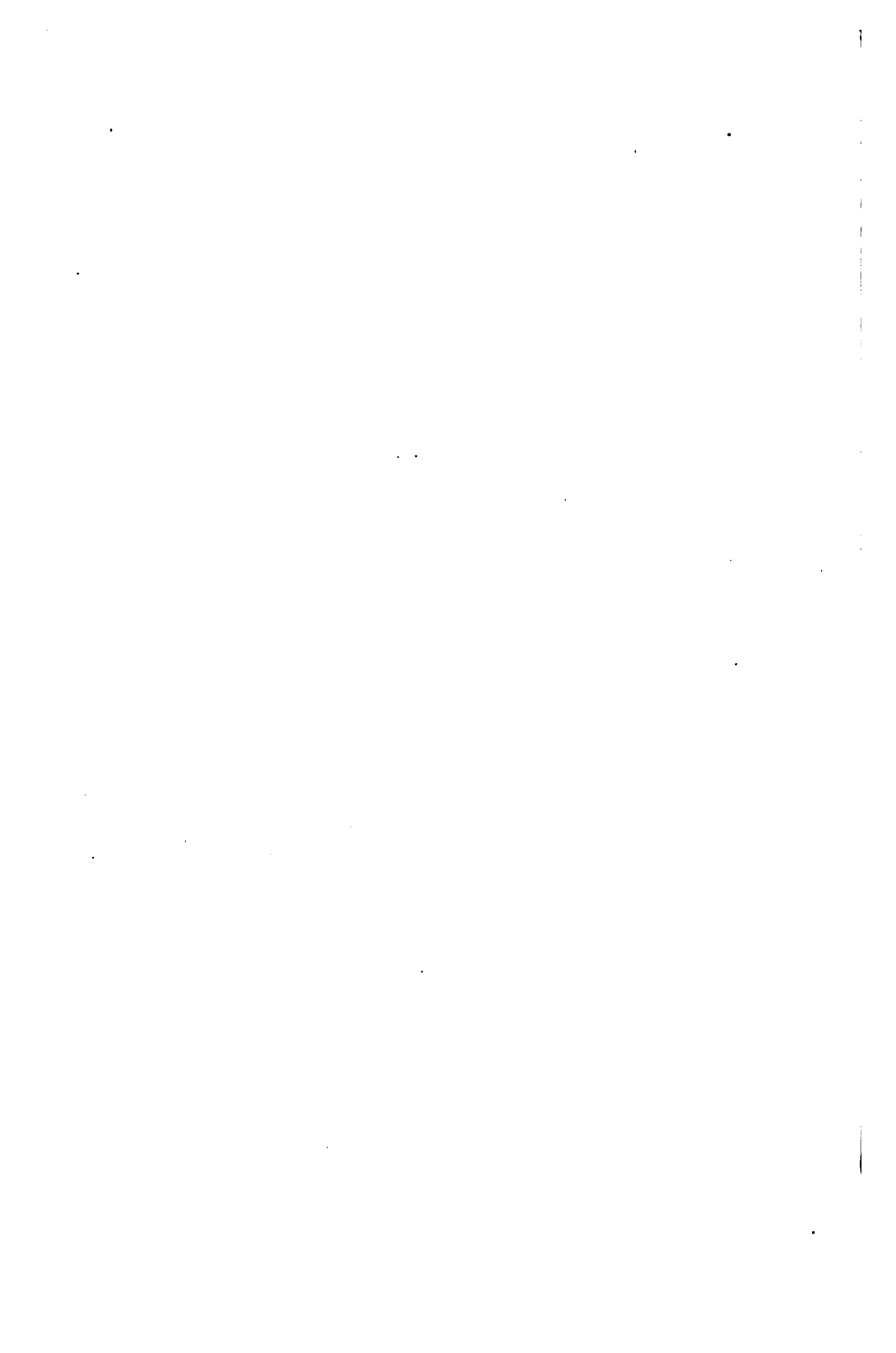
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